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No. 2347

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

KENDRICK STATE BANK, a Corporation,
Appellant,

vs.

FIRST NATIONAL BANK OF PORTLAND, a Corporation,
Appellee.

Appeal from the District Court of the United
States for the District of Oregon.

TRANSCRIPT OF RECORD.

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No. 2847

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

KENDRICK STATE BANK, a Corporation,
Appellant,

VS.

FIRST NATIONAL BANK OF PORTLAND, a Corporation,
Appellee.

**Appeal from the District Court of the United
States for the District of Oregon.**

TRANSCRIPT OF RECORD.

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

KENDRICK STATE BANK, a Corporation,
Appellant,

vs.

FIRST NATIONAL BANK OF PORTLAND, a Corporation,
Appellee.

**Names and Addresses of Attorneys
upon this Appeal:**

For Appellant:

Stapleton & Sleight,	Yeon Bldg., Portland, Ore.
C. L. McDonald,	Lewiston, Ida.

For Appellee:

Dolph, Mallory, Simon & Gearin, Portland, Oregon

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*In the District Court of the United States for the
District of Oregon.*

Be it Remembered, that on the 9th day of January,
1913, there was duly filed in the District Court of
the United States for the District of Oregon, a
Complaint, in words and figures as follows, to
wit:

[Complaint.]

*In the District Court of the United States for the
District of Oregon.*

KENDRICK STATE BANK, a corporation,
Plaintiff,

v.

FIRST NATIONAL BANK OF PORTLAND, a
corporation,
Defendant.

The complaint of the above named plaintiff respectfully shows to the court:

I.

That at all times hereinafter mentioned plaintiff was and is a corporation duly organized under the laws of the State of Idaho having its place of business at Kendrick in the State of Idaho, and is a resident and citizen of the State of Idaho.

II.

That the defendant at the times hereinafter mentioned was and is a banking corporation organized and existing under and by virtue of the act of Congress for the incorporation of national banks and having its place of business and being located in the City

of Portland, State of Oregon, and is a resident and citizen of the State of Oregon.

III.

That the amount involved in this act, exclusive of interest and costs, exceeds the sum of \$3000.00.

IV.

That in the year 1910 the plaintiff deposited with the defendant the sum of \$10,000 which was received by defendant and retained by it under the agreement that it would be repaid to plaintiff upon the checks or drafts of the plaintiff, or upon demand. That thereafter certain sums were withdrawn therefrom by the plaintiff from time to time, and on the 8th day of February, 1912, plaintiff had on deposit with the defendant the sum of \$8283.09, the same being the balance of the deposit aforesaid.

V.

That on Feb. 8, 1912, and on January 6, 1913, plaintiff demanded of the defendant that it pay to plaintiff said sum of \$8283.09 but the defendant has refused and neglected to pay said sum or any part thereof, and there remains due plaintiff from defendant said sum of \$8283.09, together with interest from the date of such demand, no part of which has been paid.

Wherefore plaintiff demands judgment against the defendant for \$8283.09 together with interest and costs.

C. L. McDONALD and
STAPLETON & SLEIGHT,
Plaintiff's Attys.

[Endorsed]: Complaint. Filed Jan. 9, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 27 day of January, 1913, there was duly filed in said Court, an Answer, in words and figures as follows, to wit:

[Answer.]

*In the District Court of the United States for the
District of Oregon.*

KENDRICK STATE BANK, a corporation,
Plaintiff,

vs.

FIRST NATIONAL BANK OF PORTLAND, a
corporation,
Defendant.

The defendant answers to the Complaint:

I.

Defendant admits Paragraphs I, II, and III of said Complaint.

II.

Defendant denies each and every allegation contained in Paragraph IV of said Complaint, except as in this Answer to said Paragraph IV admitted. Defendant further answering said Paragraph IV alleges: That on the 11th day of June, 1910, at the special instance and request of the Plaintiff, the Defendant loaned to the Plaintiff, the Kendrick State Bank, to be repaid to Defendant in three months thereafter, with six per cent. per annum interest, the sum of

\$5,000.00, to evidence which loan the Plaintiff, said Kendrick State Bank, issued to the Defendant its Certificate of Deposit for said sum of \$5,000.00; that said sum of \$5,000.00 so loaned by Defendant to Plaintiff as aforesaid, was deposited by Plaintiff with Defendant to the credit of said Plaintiff, with the understanding that the money so loaned was to remain on deposit with Defendant's Bank subject to the checks of the Plaintiff, and any balance of such deposit remaining undrawn at the maturity of the loan was to be applied as a credit thereon.

Defendant further alleges that when said loan matured the Plaintiff applied to the Defendant for a renewal thereof upon the same terms and conditions, and such renewal was granted by the Defendant to Plaintiff. And thereafter from time to time as said loan matured, the Plaintiff applied to Defendant for renewals thereof upon like terms and conditions as the loan was originally made by Defendant to Plaintiff; that said requests were granted by Defendant and said loan renewed as aforesaid until on or about December 6, 1910, when the Plaintiff requested of the Defendant a renewal of said loan for the period of six months, and also requested of Defendant as a matter of convenience for Plaintiff's Bank, that the Defendant accept in lieu of the Certificate of Deposit that had from time to time been issued by Plaintiff to the Defendant to evidence said loan, the Note of J. W. Bradbury, the then President of said Kendrick State Bank, the Plaintiff, and who acted as the Agent

and representative of Plaintiff in negotiating said loan, which request so made by Plaintiff the Defendant acceded to and thereupon renewed and extended said loan so made by Defendant to Plaintiff for an additional period of six months and to evidence said loan Plaintiff delivered to Defendant the promissory note of J. W. Bradbury the then President of the Plaintiff.

Defendant further alleges that at Plaintiff's request said loan was again renewed and extended until December 10, 1911, when the Plaintiff applied to the Defendant for an increase of said loan from \$5,000.00 to \$10,000.00 upon the same terms and conditions as the original loan was made, and for a further extension of the time in which to repay the loan made by Defendant to Plaintiff.

Defendant further alleges that on said December 10, 1911, Defendant agreed to and did loan to Plaintiff at its request as aforesaid and upon the same terms and conditions as the original loan was made, the additional sum of \$5,000.00, making the amount loaned by Defendant to Plaintiff at the date last named, the sum of \$10,000.00, to evidence which loan the Plaintiff delivered to Defendant the note of said J. W. Bradbury, then President of the Plaintiff and its agent and representative, payable on demand or to the order of Defendant, with six per cent. per annum interest.

Defendant further alleges that when said loan was originally made and from time to time said Plaintiff deposited with Defendant as security for the moneys

loaned by Defendant to Plaintiff various collateral, all of which collateral, however, has been heretofore returned and surrendered to the Plaintiff at its request and Defendant has no collateral or other security for the moneys due it from Plaintiff.

Defendant further alleges that on or about February 8, 1912, the Plaintiff became insolvent and pursuant to the laws of the State of Idaho, the State Bank Commissioner of the said State of Idaho took control and possession of said Plaintiff, the Kendrick State Bank and its assets and proceeded to liquidate the affairs of said Bank in accordance with the banking laws of said State of Idaho. That at the time said Kendrick State Bank, the Plaintiff herein, became insolvent and was taken possession of by the State Bank Commissioner of Idaho, and until February 15, 1912, the said Plaintiff had on deposit with the Defendant a balance of \$8,283.09, (being the moneys which Plaintiff seeks to recover judgment in this action for) on which fund Defendant had a general banker's lien to secure the payment of the moneys due Defendant from Plaintiff, and which Defendant had a right to apply in payment of the indebtedness aforesaid, and that when Defendant learned of the insolvency of said Kendrick State Bank and that the State Bank Commissioner of Idaho had taken the control and possession thereof and was managing and conducting its affairs and liquidating the same, the Defendant applied said money and set off said deposit with Defendant, to wit, said sum of \$8,283.09 to the payment to that ex-

tent of the aforesaid indebtedness of the Plaintiff to the Defendant, crediting the said sum of \$8,283.09 upon the indebtedness of Plaintiff to the Defendant, and leaving still due and owing and unpaid from the Plaintiff to the Defendant on the principal of said indebtedness \$1716.91; that on February 16, 1912, there was a payment made to Defendant on account of the indebtedness due from Plaintiff to the Defendant of \$15.00, which was credited on the indebtedness aforesaid, leaving then due, owing and unpaid from Plaintiff to Defendant the sum of \$1701.91, with interest at 6 per cent per annum, no part of which has been paid and the whole of which is still due and owing from Plaintiff to Defendant.

III.

Defendant admits that Plaintiff made demand of Defendant for the payment of the sum of \$8,283.09 alleged in Paragraph V of the Complaint, and that it has refused and neglected to pay the same, or any part thereof, but it denies that there remains due Plaintiff from the Defendant the said sum of \$8,283.09, or any sum whatever, either with or without interest, but on the contrary Defendant alleges that there is due and owing from Plaintiff to Defendant the said sum of \$1701.91, with interest at six per cent. per annum, as alleged in Paragraph II of this Answer.

Defendant further answering said Complaint and for a counter claim to the cause of action therein set out, alleges:

That on the 11th day of June, 1910, at the special

instance and request of the plaintiff, the Defendant loaned to the Plaintiff, the Kendrick State Bank, to be repaid to Defendant in three months thereafter, with six per cent. per annum interest, the sum of \$5,000.00, to evidence which loan the Plaintiff, said Kendrick State Bank, issued to the Defendant its Certificate of Deposit for said sum of \$5,000.00; that said sum of \$5,000.00 so loaned by Defendant to Plaintiff as aforesaid, was deposited by Plaintiff with Defendant to the credit of said Plaintiff, with the understanding that the money so loaned was to remain on deposit with Defendant's Bank subject to the check of the Plaintiff, and any balance of such deposit remaining undrawn at the maturity of the loan was to be applied as a credit thereon.

Defendant further alleges that when said loan matured Plaintiff applied to the Defendant for a renewal thereof upon the same terms and conditions, and such renewal was granted by the Defendant to Plaintiff. And thereafter from time to time as said loan matured, the Plaintiff applied to Defendant for renewals thereof upon like terms and conditions as the loan was originally made by Defendant to Plaintiff; that said requests were granted by Defendant and said loan was renewed as aforesaid until on or about December 6, 1910, when the Plaintiff requested of Defendant a renewal for the period of six months, and also requested of Defendant as a matter of convenience for Plaintiff's Bank, that the Defendant accept in lieu of the Certificate of Deposit that had from time

to time been issued by Plaintiff to the Defendant to evidence said loan, the note of J. W. Bradbury, the then President of said Kendrick State Bank, the Plaintiff, who acted as the Agent and representative of Plaintiff in negotiating said loan, which request so made by Plaintiff, the Defendant acceded to and thereupon renewed and extended said loan so made by Defendant to Plaintiff for an additional period of six months and to evidence said loan Plaintiff delivered to Defendant the promissory note of J. W. Bradbury the then President of the Plaintiff.

Defendant further alleges that at Plaintiff's request said loan was again renewed and extended until December 10, 1911, when the Plaintiff applied to the Defendant for an increase of said loan from \$5,000.00 to \$10,000. upon the same terms and conditions as the original loan was made, and for a further extension of the time in which to repay the loan made by Defendant to Plaintiff.

Defendant further alleges that on said December 10, 1911, Defendant agreed to and did loan to Plaintiff at its request as aforesaid and upon the same terms and conditions as the original loan was made, the additional sum of \$5,000.00 making the amount loaned by Defendant to Plaintiff at the date last named, the sum of \$10,000.00, to evidence which loan the Plaintiff delivered to Defendant the note of said J. W. Bradbury, then President of the Plaintiff and its agent and representative, payable on demand to the order of Defendant, with six per cent. per annum interest.

Defendant further alleges that when said loan was originally made and from time to time, said Plaintiff deposited with Defendant as security for the moneys loaned by Defendant to Plaintiff various collateral, all of which collateral, however, has been heretofore returned and surrendered to the Plaintiff at its request and Defendant has no collateral or other security for the moneys due it from Plaintiff.

Defendant further alleges that on or about February 8, 1912, the Plaintiff became insolvent and pursuant to the laws of the State of Idaho, the State Bank Commissioner of the State of Idaho took control and possession of said Plaintiff, the Kendrick State Bank and its assets and proceeded to liquidate the affairs of said Bank in accordance with the banking laws of said State of Idaho; that at the time said Kendrick State Bank, the Plaintiff herein, became insolvent, and was taken possession of by the State Bank Commissioner of Idaho, and until February 15, 1912, the said Plaintiff had on deposit with the Defendant a balance of \$8,283.09 (being the same moneys which Plaintiff seeks to recover judgment in this action for) on which fund Defendant had a general banker's lien to secure the payment of the moneys due Defendant from Plaintiff, and which Defendant had a right to apply in payment of the indebtedness aforesaid, and that when Defendant learned of the insolvency of said Kendrick State Bank and that the State Bank Commissioner of Idaho had taken the control and possession thereof and was managing and conducting its affairs

and liquidating the same, the Defendant applied said money and set off said deposit with Defendant, to wit, said sum of \$8,283.09 to the payment to that extent of the aforesaid indebtedness of the Plaintiff to the Defendant, and leaving still due and owing and unpaid from Plaintiff to the Defendant on the principal of said indebtedness \$1716.91; that on February 16th, 1912, there was a payment made to Defendant on account of the indebtedness due from plaintiff to defendant of \$15.00, which was credited on the indebtedness aforesaid, leaving then due, owing and unpaid from Plaintiff the sum of \$1701.91, with interest due Defendant from Plaintiff on account of the moneys so loaned as aforesaid, to wit: 6% per annum on \$10,000.00 from December 10, 1911 to February 15, 1912; 6% per annum on \$1716.91 from February 15, 1912 to February 16, 1912, and 6% per annum on \$1701.91 from February 16, 1912, no part of which has been paid and the whole of which is still due and owing from Plaintiff to Defendant.

WHEREFORE, Defendant prays judgment against Plaintiff for the sum of \$1701.91, with interest as follows: 6% per annum on \$10,000.00 from December 10, 1911, to February 15, 1912; 6% per annum on \$1716.91 from February 15th, 1912, to February 16, 1912, and 6% per annum on \$1701.91 from February 16, 1912, and for the costs and disbursements of this action.

DOLPH, MALLORY,
SIMON & GEARIN,
Attorneys for Defendant.

[Endorsed]: Answer. Filed Jan. 27, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 21 day of February, 1913, there was duly filed in said Court, a Reply, in words and figures as follows, to wit:

[Reply.]

*In the District Court of the United States for the
District of Oregon.*

KENDRICK STATE BANK, a corporation,
Plaintiff,

v.

FIRST NATIONAL BANK OF PORTLAND, a
corporation,

Defendant.

For its reply to the answer the plaintiff alleges and shows as follows:

I.

The plaintiff denies each and every allegation contained in paragraph II of said answer except as herein admitted, and alleges that on or about June 6, 1910, the defendant loaned to plaintiff the sum of \$5000, which sum was left on deposit with defendant subject to the checks or drafts of the plaintiff. That the plaintiff then delivered to defendant as evidence of said loan its certificate of deposit for \$5000 due in three months with interest at 6%, and at the same time delivered to defendant as collateral security for said loan certain notes and a mortgage, payable by

third parties to plaintiff. That at the maturity thereof said loan was renewed for another three months upon the same terms and collateral. That when such renewal note matured on or about December 12, 1910, J. W. Bradbury, the then president of the plaintiff, applied to the defendant to substitute his personal note and collateral in place of said certificate of deposit and collateral formerly given by the plaintiff as above stated, to which proposition the defendant assented; and thereupon the said Bradbury gave to defendant his personal note for \$5000 due in six months from December 12, 1910, and deposited with defendant as collateral security for the payment of said note thirty shares then owned by him of the capital stock of plaintiff bank, and thereupon said loan of \$5000 to plaintiff was paid and discharged, and defendant surrendered and delivered up said certificate of deposit and the collateral notes and mortgage theretofore held by it. That upon giving his said note for \$5000 to defendant as aforesaid, said Bradbury requested defendant to credit the plaintiff with the amount thereof for its reserve deposit subject to its checks or drafts, which was done, and Bradbury then, with the knowledge and consent of the defendant, credited his personal account with plaintiff bank in said sum, as being received by plaintiff from defendant, and thereafter drew the whole of said sum from plaintiff bank for his own personal use, and the plaintiff never received any part thereof or derived any benefit therefrom, except as hereinafter stated.

That the said note of Bradbury was renewed by defendant from time to time at his request until December 10, 1911 when, at the request of said Bradbury, the defendant made a loan of an additional sum of \$5000 to Bradbury, upon his personal note, secured by an additional fifty shares of the capital stock of the plaintiff bank, which stock was owned by Bradbury, and at Bradbury's request the defendant credited the plaintiff with said additional sum of \$5000 for its reserve deposit subject to its checks or drafts, and said Bradbury then, with the knowledge and consent of the defendant, credited his personal account in plaintiff bank with said sum as being received by plaintiff from defendant, and thereafter drew the whole of said sum from plaintiff bank for his own personal use, and the plaintiff never received any part thereof or derived any benefit therefrom, except that between December 12, 1910, and February 8, 1912, it drew checks and drafts in the sum of \$1716.91 against said account, which were paid by the defendant. That on February 8, 1912, plaintiff had on deposit with defendant the balance of \$8,283.09, no part of which has been paid.

II.

For reply to the counterclaim contained in the answer the plaintiff denies each and every allegation therein contained except as set forth in the foregoing paragraph I, and plaintiff hereby reiterates and adopts all the allegations of paragraph I herein as and for a reply to the said counterclaim.

WHEREFORE plaintiff demands judgment for

the relief demanded in the complaint.

STAPLETON & SLEIGHT,

C. L. McDONALD,

Ptff's. Attys.

[Endorsed]: Reply. Filed Feb. 21, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 23 day of June, 1913,
there was duly filed in said Court, a Stipulation,
in words and figures as follows, to wit:

[Stipulation to Waive Jury.]

*In the District Court of the United States for the
District of Oregon.*

KENDRICK STATE BANK, a corporation,

Plaintiff,

vs.

FIRST NATIONAL BANK OF PORTLAND, a
corporation,

Defendant.

It is stipulated between the parties to the above entitled action that this cause shall be tried before the court, without the intervention of a jury.

STAPLETON & SLEIGHT,

C. L. McDONALD,

Attorneys for Plaintiff.

DOLPH, MALLORY, SIMON

& GEARIN,

Attorneys for Defendant.

[Endorsed]: Stipulation. Filed June 23, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 4th day of August, 1913, there was duly filed in said Court, an Opinion, in words and figures as follows, to wit:

[Opinion of Court.]

*In the District Court of the United States for the
District of Oregon.*

No. 5877

KENDRICK STATE BANK, a corporation,

Plaintiff,

v.

FIRST NATIONAL BANK OF PORTLAND, a
corporation,

Defendant.

Stapleton & Sleight and C. L. McDonald for Plaintiff.

Dolph, Mallory, Simon & Gearin for Defendant.

Prior to June, 1910, the Kendrick State Bank of Idaho had been a correspondent of the defendant, the First National Bank of Portland, Oregon. J. W. Bradbury, who was the president of the former bank, was the owner of the capital stock thereof to the amount of \$23,000 out of an entire capitalization of \$25,000. In practical reality, he was the owner and manager of the bank, and transacted its business affairs very much as if no one else were interested with him. About the 11th day of June, 1910, the Kendrick

Bank, acting through J. W. Bradbury, its president, arranged by correspondence with the Portland Bank to issue to the latter its certificate of deposit for \$5.000, accompanied by certain collateral, in consideration of which the Portland Bank extended a credit to the Kendrick Bank in a like sum, the same to bear interest at six per cent per annum. This credit was extended from time to time under the same arrangement until December 6, 1910, when J. W. Bradbury, as president of the Kendrick Bank, wrote the Portland Bank as follows:

“Kendrick, Idaho, Dec. 6th, 1910.

J. W. Newkirk, Cashier,
The First National Bank,
Portland, Ogn.

Dear Sir:—

In reference to our C-D due Dec. 12th, for \$5000.00,

Would it be possible for us to get an extension on this for six months?

The Collections with are at a standstill and from the outlook I am of the opinion they will continue so until another crop is harvested.

We inclose our C-D for \$5000.00 for the time asked for in case you can grant us the extension asked to replace the one you hold.

We are writing you on another sheet for this to be carried in another way with our reasons for asking for the change.

Hoping you will grant us the favor of an extension

and thanking you for your many kindnesses of the past, I am,

Very truly yours,

J. W. Bradbury, Prest."

The letter referred to in the above is as follows:

"Kendrick, Idaho, Dec. 6th, 1910.

J. W. Newkirk, Cashier,

The First National Bank,

Portland, Ogn.

Dear Sir:—

I am sending herewith my personal note for \$5000.00 with Kendrick Bank Stock for like amount attached for your consideration.

We would like to have you in case you can grant us the extension asked in letter regarding our C-D for \$5000.00 due Dec. 12, 1910, to have you take this note and pass to our credit in place of the C-D-.

The reason for this is, in our statements to the State Bank Examiner which are published we now have to publish any Certificates of Deposit to other banks for borrowed money as such and in a farming community this always causes unfavorable comment and naturally hurts.

I feel sure our average Daily Balance as we have kept it for the past few months will be kept as strong and we want this extension more to keep our reserve in as good shape as possible.

Hoping if you can carry us for the extension you will accept this method of loaning us this amount, and again thanking you for your great kindness of the

past, I am,

Yours truly,

J. W. Bradbury, Prest."

On the 7th the Portland Bank, through its cashier, wrote the Kendrick Bank:

"Answering yours of the 6th instant, we will be pleased to make the extension referred to by your. and will accept the note in lieu of the Certificates of Deposit."

Certain certificates of stock in the Kendrick Bank were indorsed by Bradbury and another to the Portland Bank, as security for the extension. In pursuance of this arrangement, credit was extended to the Kendrick Bank from time to time in the amount of \$5000.00, the note of Bradbury in like amount being renewed until December 11, 1911, when, under a like arrangement, the credit to the Kendrick Bank was enlarged to \$10,000, Bradbury giving his individual note in like amount to the Portland Bank. At the same time Bradbury indorsed to the Portland Bank an additional 50 shares of stock of the Kendrick Bank as security for the loan or credit. The money in either instance, whether credit was extended the Kendrick Bank by reason of the issuance of its certificate of deposit or by reason of the execution by Bradbury of his note to the Portland Bank, was placed to the account of the Kendrick Bank by the Portland Bank, and was checked against at all times by the Kendrick Bank, and by none other.

Speaking of the enlarged credit, Mr. Newkirk, of

the Portland Bank, testifies that they were not loaning any money to Bradbury individually—"absolutely none." At this time Bradbury visited Portland, and the arrangement for the enlargement of the loan was then agreed upon. Newkirk knew nothing of Bradbury's personal responsibility, and cared nothing about it, as he supposed he was dealing with the Kendrick Bank and upon its sole credit and responsibility. He says, "I accepted that note for the Kendrick State Bank," and, in effect, that the transaction was with Bradbury as president, and for account of the Kendrick State Bank.

Bradbury corroborates Newkirk, and declares that he had no arrangement with the Portland Bank for his individual account. The interest on the note executed in his name was paid by the Kendrick Bank, and the account was carried wholly between the Portland and Kendrick Banks, the money arising from the loan having passed to the credit of the latter bank. The account was checked against and replenished from time to time as the nature of the business between the banks required.

About the first of February, 1912, the Kendrick Bank failed, and passed into the hands of the State Bank Commissioner. Prior to its failure, all the collateral except the bank stock had been returned to the Kendrick Bank, and some time after such failure the bank stock was handed over to Bradbury. The Kendrick Bank was subsequently reorganized, it having secured Bradbury's stock, which was utilized for that

purpose. In the course of the negotiations leading up to the reorganization, Bradbury was induced to transfer by check \$10,000 from his account then standing to his credit in the Kendrick Bank, which was something above that amount, and at the same time the Depositors' Committee turned over to Bradbury certain notes, being assets of the bank.

It should be stated that, when credit was negotiated for the Kendrick Bank with the Portland Bank by the use of Bradbury's note, Bradbury passed to his credit in the Kendrick Bank a like amount, charging the Portland Bank with the same amount, which would be the usual and regular method of keeping book account of the transaction.

The Portland Bank was not a party to the negotiations of Bradbury with the committee, nor did it have knowledge concerning them.

Bradbury further testifies that he instructed the Portland Bank to at any time it saw fit charge the account of the Kendrick Bank with the note. When the Kendrick Bank failed, there was a balance standing to its credit on account with the Portland Bank of \$8283.09. The Portland Bank thereupon took credit for this balance, and charged it against the Bradbury note. Now the Kendrick Bank has sued the Portland Bank for this balance as for moneys deposited with it subject to check or draft.

The Portland Bank answers, setting up the facts leading up to and touching the transaction in detail, and alleges as the ultimate fact that the Portland

Bank loaned to the Kendrick Bank the sum of \$10,000, and as evidence of such loan the latter bank delivered to defendant the note of J. W. Bradbury for the amount, Bradbury being then the president of said bank and acting for it and in its behalf, as its representative and agent. The Portland Bank also sets up a counter-claim for the difference between the amount sued for and the amount of such note, less \$15 paid subsequent to the failure of the Kendrick Bank, being for the sum of \$1701.91, with interest at six per cent per annum from the time such balance was charged against the note by the Portland Bank.

WOLVERTON, District Judge:

It is admitted on the part of plaintiff's counsel that, if the loan made by the Portland Bank was to the Kendrick Bank and not to Bradbury individually, and can be so treated in legal contemplation, then the Portland Bank was legally authorized to charge off the balance standing to the credit of the Kendrick Bank against the Bradbury note, and thus protect itself against loss on account of the failure of the Kendrick Bank to that extent.

The vital question depends upon whether, in an action at law, the defendant will be permitted to show that the debt incurred by the execution of the Bradbury note is the debt of the Kendrick Bank, as it was really intended to be by the plain agreement and understanding of the parties.

It is the doctrine in Oregon that, as it relates to simple contracts, the presumption that a contract

made in the name of the agent of a known principal is the contract of the agent and not of the principal is a disputable one, and that it may be shown by parole that the principal is bound also, but that in no event may the agent be so discharged. *Barbre v. Goodale*, 28 Or. 465. But it was said in that case:

“This doctrine must be limited to simple contracts, and may not be extended to negotiable instruments and specialties under seal, as they constitute an exception to the rule.”

In the present case, however, the defendant, in purpose and effect, is not suing on the note, but to recover on the contract of the parties, of which the note is only an incident. It is a contract of which the principal has received, as it was so intended, the sole and entire benefit. The money obtained through the arrangement went at once to the credit of the Kendrick Bank, and was so held by its correspondent, against which the Kendrick Bank drew checks and drafts as occasion required, and constituted its source of credit with the Portland Bank. Indeed, the contract was entered into by the bank through its recognized officer, and the case does not stand upon the footing of a mere agent contracting in the name of his principal. Individually, Bradbury received not the slightest benefit from the arrangement, and, while he probably would not be allowed to escape being bound by his obligation, yet I am constrained to the view that the bank also, in an action directly between the parties to the contract, cannot escape liability. See *Appel of*

Third National Bank of Philadelphia et al., 12 L. R. A. 223. It would work a glaring injustice here to adopt the opposite view. This is readily apparent from the simple facts of the case.

If it be said that the Kendrick Bank, or its president in its behalf, adopted this method of obtaining credit with the Portland Bank with a view to suppressing a full statement of its liabilities to the Bank Commissioner, it may be conclusively answered that the Kendrick Bank will not be permitted to take advantage of its own wrong and thereby perpetrate an injustice upon the Portland Bank.

Another question presented is whether the president of the bank was authorized to enter into such a contract in behalf of the corporation, but the bank having received the sole and entire benefit of the transaction, it has ratified the acts of its chief officer, even conceding that he acted beyond the scope of his authority, a question we are not now called upon to determine. *Aldrich v. Chemical National Bank*, 176 U. S. 618.

In view of these considerations, the defendant is not only entitled to its set-off as claimed, but to recover the balance due from the plaintiff upon the account between the banks.

[Endorsed]: Opinion. Filed Aug. 4, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 4th day of August, 1913, the same being the 25th Judicial

day of the Regular July Term of said Court; Present: the Honorable Chas. E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Judgment.]

*In the District Court of the United States for the
District of Oregon.*

No. 5877

KENDRICK STATE BANK

v.

FIRST NATIONAL BANK OF PORTLAND.

This cause having heretofore, on the 24th day of June, 1913, been submitted to the Court without the intervention of a jury, and taken under advisement, came on regularly at this time for the verdict and decision of the Court.

Whereupon the Court having been fully advised in the premises finds for the defendant and against the plaintiff in the sum of \$1851.58:

Now, therefore, based thereon, it is Ordered and adjudged that the said defendant First National Bank of Portland, Oregon, a corporation have and recover of and from the said plaintiff Kendrick State Bank, a corporation, the sum of \$1851.58, together with its costs and disbursements herein taxed at \$78.95.

And afterwards, to wit, on the 27th day of June, 1913, there was duly filed in said Court, a Stipulation and Exhibit, in words and figures as follows, to wit:

[Stipulation and Plaintiff's Exhibit 9.]

*In the District Court of the United States for the
District of Oregon.*

KENDRICK STATE BANK, a corporation,
Plaintiff,

v.

FIRST NATIONAL BANK OF PORTLAND, a
corporation,

Defendant.

IT IS HEREBY STIPULATED between the parties to the above entitled action, by their respective counsel, that the annexed seventeen sheets contain a true and correct copy and transcript from the minutes of meetings of the board of directors of the Kendrick State Bank held on and between July 6, 1909, to and including Jan. 17, 1912, as contained in the original minutes of the meetings of said board of directors introduced in evidence by the plaintiff in the above entitled action, said book being marked plaintiff's exhibit 9.

IT IS FURTHER STIPULATED that the copies of said minutes hereto annexed be filed in this cause in place of said original minute book and that the same shall have the same force and effect as evidence in this case as said original minute book would have had, subject to all the objections thereto made by counsel herein, and it is stipulated that the said original minute book may be withdrawn from the files and returned to plaintiff.

Dated June 26, 1913.

STAPLETON & SLEIGHT,
Counsel for Plaintiff.

DOLPH, MALLORY,
SIMON & GEARIN,
Counsel for Defendant.

[Plffs. Ex. 9.]

July 6, 09.

At a regular meeting of the Board of Directors of the Kendrick State Bank, Kendrick, Idaho, held on the 6th day of July, 1909 A. D. the following resolutions were unanimously adopted:

Resolved that the President J. W. Bradbury and cashier E. D. Bradbury of this bank, and each of them be and they are hereby jointly and severally authorized and empowered to borrow on behalf of this bank from the Commercial National Bank of Chicago from time to time such sums of money as said officers or either of them may deem expedient, not exceeding in the aggregate at any one time the principal sum of ten thousand & no-100 dollars (\$10000.00) on such terms and conditions as such officer or officers acting hereunder may, in his or their absolute discretion, deem best, and from time to time to renew any and all or any part of such loans so made, as the same mature, or otherwise, until all such loans are paid in full, with interest: and to pledge for the payment of any such loan or loans, or renewal thereof, or any indebtedness, obligation or liability of this bank, such securities, assets or property of this bank as such officer or offi-

cers may deem necessary or proper, and to give the obligation or obligations of this bank in evidence of such loan or loans in such form with such conditions, terms, stipulations, waivers and bills of sale, of securities or assets or property as such officer or officers shall deem proper; that each of such officers of this bank be, and he is hereby also authorized to borrow money from the Commercial National Bank of Chicago, by rediscounting with said Commercial National Bank of Chicago any of the bills receivable, at any time held by this bank not exceeding in the aggregate at any one time the sum of ten thousand and no-100 dollars (\$10000.00) in addition to the sum above authorized to be borrowed upon the direct obligations of this bank, on such terms and conditions as such officer or either of them may deem for the best interest of this bank, and that the Commercial National Bank of Chicago may at any time apply any property or money in, or which may come to its hands belonging to this bank to the payment of any obligations, indebtedness or liabilities from this bank to it, whether due or not.

This is to certify that the above and foregoing is a true copy of a resolution duly passed and adopted by the directors of the Kendrick State Bank at a meeting of such directors duly called, convened and held according to law, and the by laws of said bank on the 6th day of July A. D. 1909.

J. W. Bradbury, president E. D. Bradbury, secretary
Corporate seal of bank attached.

The authority conferred by the attached form of resolution should be conferred upon officers of the bank other than those who sign the certificate, and should have the seal of the bank attached.

No other business on board meeting adjourned.

Correct attest:

E. D. Bradbury

R. M. Walker

Present:

R. M. Walker,

E. D. Bradbury

J. W. Bradbury

A. Bradbury

Kendrick Idaho, Wednesday June 15, 1910.

The regular meeting of the board of directors of The Kendrick State Bank to be held in its office on this Wednesday June 15, 1910.

No quorum being present meeting adjourned.

E. D. Bradbury cashier J. W. Bradbury President

Kendrick Idaho Saturday July 16, 1910.

At a meeting of the board of directors of The Kendrick State Bank held in its office at Kendrick Idaho on this Saturday July 16, 1910 the following resolution was adopted:

Resolved that the president J. W. Bradbury and cashier E. D. Bradbury of this bank and each of them be and they are hereby jointly and severally authorized and empowered to borrow on behalf of this bank from the Commercial National Bank of Chicago from time to time such sums of money as said officers or either of them may deem expedient, not exceeding in the aggregate at any one time the principal sum of ten thousand & no-100 dollars (\$10000.00) on such

terms and conditions as such officer or officers acting hereunder may, in his or their absolute discretion deem best, and from time to time to renew any and all or any part of such loans so made, as the same mature, or otherwise, until all such loans are paid in full, with interest: and to pledge for the payment of any such loan or loans, or renewal thereof, or any indebtedness, obligation or liability of this bank, such securities, assets or property of this bank as such officer or officers may deem necessary or proper, and to give the obligation or obligations of this bank in evidence of such loan or loans in such form with such conditions, terms, stipulations, waivers and bills of sale, of securities or assets or property as such officer or officers shall deem proper; that each of such officers of this bank be, and he is hereby also authorized to borrow money from the Commercial National Bank of Chicago, by rediscounting with said Commercial National Bank of Chicago, any of the bills receivable, at any time held by this bank, not exceeding in the aggregate at any one time the sum of ten thousand & No-100 dollars (\$10000.00) in addition to the sum above authorized to be borrowed upon the direct obligations of this bank, on such terms and conditions as such officer or either of them may deem for the best interest of this bank, and that the Commercial National Bank of Chicago may at any time apply any property or money in, or which may come to its hands belonging to this bank to the payment of any obligations, indebtedness or liabilities from this bank to it,

whether due or not.

This is to certify that the above and foregoing is a true copy of a resolution duly passed and adopted by the directors of the Kendrick State Bank at a meeting of such directors duly called and convened and held according to law, and the by laws of said bank on the 16th day of July, 1910.

J. W. Bradbury, president E. D. Bradbury, secretary
corporate seal not attached.

The authority conferred by the attached form of resolution should be conferred upon officers of the bank other than those who sign the certificate, and should have the seal of the bank attached.

No further business meeting adjourned.

Present: J. W. Bradbury, A. Bradbury, E. D. Bradbury.

J. W. Bradbury, president E. D. Bradbury cashier.

Kendrick Idaho, Monday August 1, 1910.

At a special meeting of the board of directors of The Kendrick State Bank held in its office on this Monday August 1, 1910.

O. E. Miller was appointed as director to fill vacancy of R. M. Walker.

Present at meeting J. W. Bradbury, A. Bradbury, E. D. Bradbury and O. E. Miller.

Letter from M. G. Cruse bank commissioner calling attention to condition of bank read and answer approved.

The following notes were ordered charged to undivided profits same being a total loss.

No. 2205 J. E. Kennedy bal, 150.20.

2206 J. C. H. Reynolds, bal. 25.

2934 J. G. Holman, bal. 6.25.

2931 J. G. Holman, bal 20.

No further business meeting adjourned.

J. W. Bradbury president E. D. Bradbury cashier.

Kendrick Idaho, Wednesday November 16, 1910.

The regular meeting of the board of directors of Kendrick State Bank held in its office on this Wednesday November 16, 1910. The following directors were present: J. W. Bradbury, president, A. Bradbury vice prest, E. D. Bradbury cashier.

No business of importance meeting adjourned to next regular meeting.

J. W. Bradbury president E. D. Bradbury cashier
Kendrick Idaho Wednesday Jany. 11-11.

The regular meeting of the board of directors held in the office of the Kendrick State Bank at Kendrick Idaho on this Wednesday January 11-1911. The following directors were present, J. W. Bradbury A. Bradbury E. D. Bradbury.

No business of importance meeting adjourned to next regular meeting date.

J. W. Bradbury president E. D. Bradbury cashier
Kendrick Idaho Wednesday Febry 15-1911.

The regular meeting of the board of directors of The Kendrick State Bank to be held in its office on this Wednesday February 15, 1911.

No quorum beinb present adjourned.

J. W. Bradbury president.

Kendrick Idaho Wednesday Mch 15-1911

The regular meeting of the board of directors of The Kendrick State Bank to be held in its office on this Wednesday Mch 15, 1911.

No quorum being present adjourned.

J. W. Bradbury president.

Kendrick Idaho May 2, 1911.

The regular annual meeting of the stockholders of The Kendrick State as held in its office on this Tuesday May 2, 1911.

Stockholders present	Shares	Total
A. Bradbury	5	
E. D. Bradbury	5	
L. P. Bradbury	5	
H. E. Abend	5	
J. M. Bradbury	230	250

The following names were put in nomination for director of The Kendrick State Bank for the ensuing year and were unanimously elected: A. Bradbury, E. D. Bradbury, L. P. Bradbury, J. E. Abend, J. W. Bradbury.

No further business meeting adjourned.

E. D. Bradbury cashier.

(Also signed by)

A. Bradbury

E. D. Bradbury

L. P. Bradbury

Hallet E. Abend

J. W. Bradbury

Kendrick Idaho Tuesday May 2, 1911.

The meeting of the board of directors of the Kendrick State Bank held in its office on this 2 day of May 1911. The following nomination for officers for the ensuing year was made:

For President, J. W. Bradbury

For vice president, E. D. Bradbury

For cashier, E. D. Bradbury

The above named officers were elected by unanimous vote to the respective position for the ensuing year.

Directors present J. W. Bradbury, E. D. Bradbury, A. Bradbury, T. P. Bradbury, H. E. Abend.

No other business meeting adjourned.

E. D. Bradbury cashier

(Also signed by)

J. W. Bradbury

E. D. Bradbury

A. Bradbury

L. P. Bradbury

Hallet E. Abend

Kendrick Idaho Tuesday May 16-1911.

At a meeting of The Board of Directors of The Kendrick State Bank held in its office on this 16- day of May 1911 the following resolution relative to the disposal of land to Jerome J. Day were passed and the president J. W. Bradbury and the cashier E. D. Bradbury authorized to transfer same.

Present J. W. Bradbury, A. Bradbury, E. D. Bradbury, T. P. Bradbury, H. E. Abend.

No further business meeting adjourned.

J. W. Bradbury president E. D. Bradbury cashier
(Also signed by)

A. Bradbury director

L. P. Bradbury director.
director.

Kendrick, Idaho, Wednesday July 19-1911.

At a regular meeting of the Board of directors of Kendrick State Bank held in its office this Wednesday July 19-1911 the following directors were present

J. W. Bradbury, E. D. Bradbury, L. P. Bradbury.

No special business, meeting adjourned.

Attest

J. W. Bradbury director E. D. Bradbury cashier
(Also signed by)

Director

A. Bradbury

L. P. Bradbury.

Kendrick Idaho Wednesday Sept 20, 1911.

At a meeting of the board of directors of The Kendrick State Bank held at its office on this Wednesday Sept 30, 1911 the following directors were present

J. W. Bradbury, E. D. Bradbury, L. P. Bradbury.

No special business meeting adjourned.

J. W. Bradbury president E. D. Bradbury cashier
(Also signed by)

A. Bradbury

L. P. Bradbury

Kendrick Idaho Wednesday Nov 22-1911

At a meeting of the board of directors of the Kendrick State Bank held in its office this Wednesday

November 22-1911 the following directors were present

J. W. Bradbury, A. Bradbury, E. D. Bradbury, L. P. Bradbury.

No special business meeting adjourned.

J. W. Bradbury pres

E. D. Bradbury cashier

(Also signed by)

A. Bradbury director

L. P. Bradbury director.

Kendrick Idaho Tuesday Jany 16-1912

The regular annual meeting of the stockholders of The Kendrick State Bank having been changed by order of state bank commissioner to the third Tuesday in January of each year The stockholders of The Kendrick State Bank of Kendrick Latah County State of Idaho held their annual meeting in the office on this day the following stock represented

J. W. Bradbury	230 shares
A. Bradbury	5
E. D. Bradbury	5
L. P. Bradbury	5
No shares represented	245
H. E. Abend not represented	5
Total capital stock shares	250

The following directors were elected for the year 1912

J. W. Bradbury, E. D. Bradbury, A. Bradbury, L. P. Bradbury, H. E. Abend.

No further business meeting adjourned until reg-

ular annual meeting of call by proper officers.

Signed

J. W. Bradbury

E. D. Bradbury

A. Bradbury

L. P. Bradbury cashier

Kendrick Idaho Wednesday Jany 17-1912

At a regular meeting of the directors of The Kendrick State Bank held in the office in Kendrick Latah County State of Idaho on this Wednesday Jany 17-1912 the following directors were present

J. W. Bradbury, A. Bradbury, E. D. Bradbury, L. P. Bradbury.

Election of officers.

The following officers were elected for their respective positions for the ensuing year

For president, J. W. Bradbury

For vice prest A. Bradbury

For cashier

In the matter of charging off bad loans the action of the president in charging off loan Geo. Clem \$3000.00

“ Geo. Clem 2500.00

making a total charged off 5500.00
was approved.

In the matter of bonding of J. W. Bradbury as president and actual manager of the Kendrick State Bank the personal bond of J. W. Bradbury with A. Bradbury and E. D. Bradbury as sureties for \$5000.00 was accepted and approved.

In the matter of bills receivable some were approved up to and including all loans made to Tuesday January 16-1912.

In the matter of loans made to directors the following were approved:

H. E. Abend, dated Dec. 26-1911 due Dec 26-1916 for \$5000.00.

A. Bradbury dated Dec. 20-1911 due Dec 20-1916 for \$5000.00.

L. P. Bradbury dated Dec. 20-1911 due Dec. 20-1916 for \$5000.00.

J. W. Bradbury dated Jan. 2-1911 on or before 5 years for \$5000.00.

No further business meeting adjourned until next regular meeting. cashier

Correct attest

J. W. Bradbury

Directors as present

(Signed)

A. Bradbury

E. D. Bradbury

director as present

L. P. Bradbury

Director as present

KNOW ALL MEN BY THESE PRESENTS:
That J. W. Bradbury as principal and A. Bradbury and E. D. Bradbury as sureties are held and are firmly bound unto the Kendrick State Bank a corporation in and of Kendrick Latah County State of Idaho in the

sum of five thousand and No-100 Dollars for the payment of which, well and truly to be made, the said J. W. Bradbury as principal and A. Bradbury and E. D. Bradbury as sureties bind themselves their heirs and administrators Jointly severally and Firmly by these present.

Sealed with out seals and dated this 17th day of January, 1912.

The Conditions of this obligation is such that if the said J. W. Bradbury shall well and truly administer the affairs of the Kendrick State Bank as executive officer thereof and shall make a full and true accounting of all matters related thereto and fully account for all transactions appertaining to the said J. W. Bradbury as president then and in that event this obligation is to be void, otherwise to remain in full force and effect.

J. W. Bradbury principal

A. Bradbury surety

E. D. Bradbury surety

[Endorsed]: Plaintiff's Exhibit 9 and Stipulation.
Filed Jun. 27, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 10th day of September 1913 there was duly filed in said Court, a Bill of Exceptions, in words and figures as follows, to wit:

[Bill of Exceptions.]

*In the District Court of the United States for the
District of Oregon.*

KENDRICK STATE BANK, a corporation,
Plaintiff,

v.

FIRST NATIONAL BANK OF PORTLAND, a
corporation,

Defendant.

This cause came on for trial before the Hon. Chas. E. Wolverton, Judge, without a jury, a jury trial having been expressly waived by stipulation in writing signed and duly filed, and the parties being represented by Stapleton & Sleight and C. L. McDonald, attorneys for plaintiff, and Dolph, Mallory, Simon & Gearin, attorneys for defendant, the following proceedings were had.

The plaintiff to maintain the issues on its part, called EMMETT E. EASTWOOD, a witness on behalf of plaintiff, who testified as follows:

Direct Examination.

I live in Lewiston, Idaho, and in the fall of 1912 I was deputy state bank commissioners of the State of Idaho, and took possession and had charge of the Kendrick State Bank from the ninth of February, 1912 until we turned it over to the new organization on April 9, 1912.

Paper marked plaintiff's Exhibit 1, consisting of a statement signed by the First National Bank of Port-

land to the Idaho Bank Commissioners offered and received in evidence. It is admitted this is the original statement rendered by defendant to plaintiff.

Plaintiff's Exhibit 1.

Kendrick State Bank, Kendrick, Id. in account with
The First National Bank of Portland, Oregon.

Dr.				Cr.		Cr.	
Jan. 31	No. R 29	\$727.45		Jan. 31	\$727.45	Jan. 29, 1912	
Feb. 1,	R 30,	137.03		Feb. 1	137.03	balance,	9877.46
6	R 3	1092.70		6	1092.70	Feb. 6 3	381.58
7	R 31	3.77		7	11.27	8 5	68.33
	P 3	7.50		8	75.83		
8	R 5	60.83	Balance	8283.09			
	R 6	15		10327.37			10327.37
				Feb. 8 Bal		8283.09	
				5877			

(Stamped) Filed June 24, 1913, A. M. Cannon,
Clk U. S. Dist. Ct.

By the COURT: This shows \$8000 on deposit with the First National Bank of Money's belonging to the Kendrick State Bank?

Plaintiff's COUNSEL: Yes a credit balance due.

By the COURT: Very well.

The foregoing statement was sent by defendant to plaintiff in answer to a telegraphic message from the State Bank Commissioners to the defendant dated Feb. 8, 1912.

It is admitted by defendant that prior to the commencement of this action the plaintiff made a demand upon the defendant for the payment of said sum of

\$8000. and that payment thereof was refused.

Plaintiff rested.

To maintain the issues upon its part the defendant called J. W. NEWKIRK who testified on behalf of the defendant as follows:

Direct Examination.

I am and for seven years have been cashier of the defendant bank and am acquainted in a business way with the plaintiff bank and with its officers. I know Mr. Bradbury one of the officers, the president. I have met him personally. The plaintiff bank was for several years past the correspondent of defendant bank. I remember the circumstances of the first loan of \$5000 made by defendant to plaintiff in June, 1910. We loaned that amount to the plaintiff at that time.

I know Mr. A. L. Mills as the president of defendant bank.

It is admitted by the plaintiff that the signature of J. W. Bradbury and of the other signors to the following letters and exhibits offered in evidence is genuine, and that said letters were written and mailed and received in due course at or about the times on which they bear date.

I identify the letter marked "Defendant's Exhibit A" which was received by defendant from J. W. Bradbury, the president of the plaintiff bank about the time of its date.

Letter dated June 11, 1910 marked "Defendant's Exhibit A" offered in evidence as follows:

Defendant's Exhibit A.

Kendrick State Bank, Kendrick, Idaho.

Kendrick, Idaho, June 11, 1910.

A. L. Mills, President

The First National Bank, Portland, Oregon.

Dear Sir:

Our cashier, Mr. E. D. Bradbury informs me he made arrangements with you to carry us for \$5000.00 on our C-D to be accompanied with collateral.

Enclosed find our C-D—No. 2751—for three months for \$5000 together with collateral amounting to \$10,230.00.

I did not put in rate as I was not sure what it would be. Kindly credit our account with this.

Thanking you for your kindness in this as well as for your many favors of the past, I am,

Yours truly,

J. W. Bradbury, Prest.

Collateral enclosed.

Fred N. Hallett, \$1880.

Maude A. A. Horner 600.

Ind-Farmers Grain 5000

Lincoln Hdw. 2000

Ralph Roberts, 750.

10,230.00

Letter dated June 13, 1910, written by A. L. Mills, president of defendant and sent to plaintiff and offered in evidence as follows:

Defendant's Exhibit B.

June 13, 1910.

Kendrick State Bank,

Kendrick, Idaho.

Gentlemen:

Yours of the 11th instant at hand and we have this day credited your account \$5000. by your certificate of deposit. We do not care to insert any rate, but at the same time, beg to advise you that it will be six per cent per annum. Herewith returned please find collateral, which we would ask you to endorse and return to us.

Yours very truly, A. L. Mills, President.

By the COURT: Did the collateral mentioned in that letter come through without being properly endorsed?

By Defendant's COUNSEL: Yes and then was sent back for re-endorsement and return.

The following letter was received by defendant bank from J. W. Bradbury, president of plaintiff bank shortly after the date it bears.

Letter dated June 16, 1910 marked "Defendant's Exhibit C" offered by defendant as follows:

Defendant's Exhibit C.

Kendrick State Bank, Kendrick Idaho.

Kendrick, Idaho, June 16, 1910.

A. L. Mills Prest. First National Bank,

Portland, Ogn.

Dear Sir:

As requested by yours of the 13th we endorse and

return to you the following collateral notes:

Fred N. Hallett	\$1880
Maude A. Horne	600
Ind. Farmers Grain	5000
Lincoln Hda. Co.	2000
Ralph Roberts,	750. \$10230.

Thanking you again for your many kindnesses, I
am,

Yours truly,

J. W. Bradbury, Prest.

Letter dated Sept. 6, 1910 marked "Defendant's exhibit D" offered by defendant as follows:

Defendant's Exhibit D.

Kendrick State Bank, Kendrick Idaho.

Kendrick, Idaho, Sept. 6, 1910.

First National Bank,

Portland, Oregon.

Gentlemen:

Will you kindly advise us if it will be satisfactory to you to extend the time on our note of \$5000 for another 30 days. If so please charge our account Sept. 12th for amount of interest due you.

Very truly,

E. D. Bradbury, cashier."

Letter dated Dec. 6, 1910, marked "Defendant's Exhibit E" offered by defendant as follows:

Defendant's Exhibit E.

Kendrick State Bank, Kendrick, Idaho, Dec. 6, 1910.

J. W. Newkirk, Cashier,

First National Bank, Portland, Oregon.

Dear Sir: In reference to our C-D- due Dec. 12th for \$5000.00.

Would it be possible for us to get an extension on this for six months?

The collections with (us) are at a standstill and from the outlook I am of the opinion they will continue so until another crop is harvested.

We enclose our C-D- for \$5000 for the time asked for in case you can grant us the extension asked to replace the one you hold.

We are writing you on another sheet for this to be carried in another way with our reasons for asking for the change.

Hoping you will grant us the favor of an extension and thanking you for your many kindnesses of the past, I am,

Very truly yours, J. W. Bradbury, Prest.

Letter dated Dec. 6, 1910 marked "Defendant's Exhibit F" offered in evidence by defendant.

Plaintiff's COUNSEL: Plaintiff objects to the introduction of the defendant's Exhibit F in evidence upon the ground that it is incompetent, irrelevant and immaterial and does not tend to prove any of the allegations contained in the defendant's answer and is inadmissible under the pleadings.

Objection overruled and plaintiff duly excepted.

Defendant's Exhibit F.

Kendrick State Bank, Kendrick Idaho.

Kendrick, Idaho, Dec. 6, 1910.

J. W. Newkirk, Cashier,

First National Bank, Portland, Oregon.

Dear Sir:

I am sending herewith my personal note for \$5000. with Kendrick Bank Stock for like amount attached for your consideration.

We would like to have you in case you can grant us the extension asked in letter regarding our C-D- for \$5000 due Dec. 12, 1910, to have you take this note and pass to our credit in place of the C-D-.

The reason for this is, in our statements to the state Bank Commissioner which are published we now have to publish any Certificates of Deposit to other banks for borrowed money as such and in a farming community this always causes unfavorable comment and naturally hurts.

I feel sure our average Daily Balance as we have kept it for the past few months will be kept as strong and we want this extension more to keep our reserve in as good shape as possible.

Hoping if you can carry us for the extension you will accept this method of loaning us this amount, and again thanking you for your great kindness of the past, I am,

Yours truly, J. W. Bradbury, Prest.

Letter marked Defendant's Exhibit F, dated Dec. 7, 1910 offered in evidence by defendant.

Plaintiff's COUNSEL: Plaintiff objects to the introduction of said letter upon the grounds specified to the introduction of Defendant's Exhibit E.

Objection overruled and plaintiff duly excepted.

Defendant's Exhibit G.

December 7, 1910.

Kendrick State Bank,
Kendrick, Idaho.

Gentlemen:

Answering yours of the 6th instant, we will be pleased to make the extension referred to by you, and will accept the note in lieu of the Certificates of Deposit. We enclose herein for endorsement two certificates aggregating thirty shares of stock which you may return to us after procuring the required endorsement.

Yours very truly, J. W. Newkirk, Cashier.

Letter dated Dec. 13, 1910, marked Defendant's Exhibit H, offered in evidence by defendant.

Plaintiff's COUNSEL: Plaintiff objects to the introduction of said letter upon the grounds specified to the introduction of Defendant's Exhibit F. Objection overruled and plaintiff duly excepted.

Defendant's Exhibit H.

Kendrick State Bank, Kendrick, Idaho.

Kendrick, Idaho, Dec. 13, 1910.

J. W. Newkirk Cashier,

The First National Bank, Portland, Oregon.

Dear Sir:

As requested in your letter of the 7th, enclosed find, Certificate of stock No. 36 five shares G. W. Suppiger, Certificate of stock No. 40 thirty five shares J. W. Bradbury.

Pardon the delay but we could not get hold of the party to sign any sooner.

Thanking you again for your kindness in the matter I am,

Very truly yours, J. W. Bradbury, prest.

Letter dated June 6, 1911, marked Defendant's Exhibit I, offered in evidence by Defendant.

Plaintiff's COUNSEL; Plaintiff objects to the introduction of said letter upon the grounds specified to the introduction of Defendant's Exhibit F. Objection overruled and plaintiff duly excepted.

Defendant's Exhibit I.

Kendrick State Bank, Kendrick, Idaho.

Kendrick, Idaho, June 6, 1911.

The First National Bank,

Portland, Oregon.

Gentlemen:

In reply to your notice of note for \$5000 due June 12th would ask if possible to have this renewed for another three months which will carry it until our fall crops begin to move.

If you can grant this extension kindly send renewal note for my signature.

Thanking you again for your many kind favors in

the past and hoping you may grant this further favor,
I am,

Very truly yours,

J. W. Bradbury.

Letter dated June 7, 1911, marked Defendant's Exhibit J offered in evidence by defendant.

Plaintiff's COUNSEL: Plaintiff objects to the introduction of said letter upon the grounds specified to the introduction of Defendant's Exhibit F. Objection overruled and plaintiff duly excepted.

Defendant's Exhibit J.

June 7, 1911.

J. W. Bradbury Esq.,

Kendrick, Idaho.

Dear Sir:

Replying to yours of the 6th instant, I have to say that it will be agreeable to renew your note for ninety days and I am enclosing a new note which you may sign and return to us; at the same time please authorize us to charge your account with the interest on the old note.

Yours very truly, J. W. Newkirk, Cashier.

Letter on letterhead of Kendrick St. Bk. dated June 10, 1911, marked Defendant's Exhibit K, offered in evidence by defendant.

Plaintiff's COUNSEL: Plaintiff objects to the introduction of said letter upon the grounds specified to the introduction of Defendant's Exhibit F. Objection overruled and plaintiff duly excepted.

Defendant's Exhibit K.

Kendrick, Idaho, June 10, 1911.

J. W. Newkirk, Cashier,

The First National Bank, Portland, Oregon.

Dear Sir:

As requested by your letter of the 7th, enclosed find note signed by J. W. Bradbury for \$5000.00 dated June 12, due ninety days in favor your good bank.

Thanking you again for your great kindness, I am,

Yours truly, J. W. Bradbury.

By the COURT: That is not signed as president?

Defendant's COUNSEL: No, it is just signed J. W. Bradbury, but it is on the letter head of the Kendrick State Bank. It is an official letter, apparently. And then he says 'Kindly charge our account with interest on old note and return to us.' Showing it is Kendrick State Bank matter.

Letter dated Sept. 22, 1911, marked Defendant's Exhibit L, offered in evidence by defendant.

Plaintiff's COUNSEL: Plaintiff objects to the introduction of said letter upon the grounds specified to the introduction of Defendant's Exhibit F. Objection overruled and plaintiff duly excepted.

Defendant's Exhibit L.

Kendrick State Bank, Kendrick Idaho.

Kendrick, Idaho, Sept. 22, 1911.

J. W. Newkirk Cashier,

The First National Bank, Portland, Oregon.

Dear Sir:

In reply to your notice of my note past due attached, would ask if possible for you to carry this for a short time longer. Our grain is all harvested and a large portion of it is in the warehouse but there has been very little sold as yet.

Thanking you again for your kindness in this matter and trusting you may be able to extend for a short time, I am,

Yours truly, J. W. Bradbury.

Letter dated Sept. 25, 1911, marked Defendant's Exhibit M, offered in evidence by defendant.

Plaintiff's COUNSEL: Plaintiff objects to the introduction of said letter upon the grounds specified to the introduction of Defendant's Exhibit F. Objection overruled and plaintiff duly excepted.

Defendant's Exhibit M.

September 25, 1911.

J. W. Bradbury Esq.,
Kendrick, Idaho.

Dear Sir:

Answering yours of the 22d inst. I will say that it will be necessary for you to pay the interest for ninety days up to September 10th, when we will grant you an extension of thirty to sixty days, as you may desire.

Yours very truly,

J. W. Newkirk Cashier.

Letter dated Sept. 28, 1911, marked Defendant's Exhibit N, offered in evidence by defendant.

Plaintiff's COUNSEL: Plaintiff objects to the introduction of said letter upon the grounds specified to the introduction of Defendant's Exhibit F. Objection overruled and plaintiff duly excepted.

Defendant's Exhibit N.

Kendrick State Bank, Kendrick, Idaho.

Kendrick, Idaho Sept. 28, 1911.

J. W. Newkirk Cashier,

The First National Bank, Portland, Oregon.

Dear Sir: In reply to your letter of the 25th would ask you to please charge our account with interest on note of J. W. Bradbury to Sept. 10, 1911 for \$5000.

Thanking you again for the kindnes, I am,

Yours truly, J. W. Bradbury, Prest.

Letter on Kendrick St. Bk. letterhead dated Dec. 16, 1911, marked Defendant's Exhibit O, offered in evidence by defendant.

Plaintiff's COUNSEL: Plaintiff objects to the introduction of said letter upon the grounds specified to the introduction of Defendant's Exhibit F. Objection overruled and plaintiff duly excepted.

Defendant's Exhibit O.

Kendrick Idaho, Dec. 16, 1911.

J. W. Newkirk, Cashier,

The First National Bank, Portland, Oregon.

Dear Sir: Enclosed find Certificate of stock No. 49 Kendrick State Bank, 50 shares as added collateral as agreed.

Thanking you again for your kindness, I am,
Very truly yours, J. W. Bradbury.

Letter dated Dec. 18, 1911, marked Defendant's Exhibit P, offered in evidence by defendant.

Plaintiff's COUNSEL: Plaintiff objects to the introduction of said letter upon the grounds specified to the introduction of Defendant's Exhibit F. Objection overruled and plaintiff duly excepted.

Defendant's Exhibit P.

Dec. 18, 1911.

Mr. J. W. Bradbury,

Kendrick State Bank, Kendrick, Idaho.

Dear Sir: We beg to return herein for your endorsement certificate number 49 for fifty shares of the stock of your bank.

Yours very truly,

J. W. Newkirk Cashier.

Letter dated Dec. 21, 1911, marked Defendant's Exhibit Q, offered in evidence by defendant.

Plaintiff's COUNSEL: Plaintiff objects to the introduction of said letter upon the grounds specified to the introduction of Defendant's Exhibit F. Objection overruled and plaintiff duly excepted.

Defendant's Exhibit Q.

Kendrick State Bank, Kendrick, Id.

Kendrick, Idaho, Dec. 21, 1911.

J. W. Newkirk, Cashier,

The First National Bank, Portland, Oregon.

Dear Sir:

Enclosed find certificate of stock endorsed as requested in your letter of the 18th. I am sorry I overlooked this, and again thanking you for the kindness I am,

Very truly yours,

J. W. Bradbury.

WITNESS: I remember an interview between myself and Mr. J. W. Bradbury, president of the Kendrick State Bank, during the early part of December, 1911, when this loan was increased from \$5000 to \$10,000. It took place at the First National Bank and Mr. Bradbury and myself were present.

Q. What did Mr. Bradbury require of you?

A. At what date was that, may I ask?

Q. When the \$10,000 loan was made to the Kendrick State Bank.

Plaintiff's COUNSEL: We object to any evidence of this nature, parole evidence, on that subject, on the same ground that the original objection was made to the letter, as stated at the time. Objection overruled and plaintiff excepted to such ruling.

WITNESS: Mr. Bradbury wished to substitute his note in lieu of the certificate of deposit of the Kendrick State Bank.

Defendant's COUNSEL: No you are mistaken. That was in June 1910. I am talking about December, 1911 when the loan was increased.

WITNESS: Oh. Well, we simply agreed to take \$5000 more in addition to what we had. We agreed

to increase the loan to the Kendrick State Bank. We absolutely were not loaning any money to Mr. Bradbury individually. I do not know anything about Mr. Bradbury's personal responsibility and never did as our dealings were entirely with the Kendrick State Bank.

In December 1911, the First National Bank loaned the Kendrick State Bank \$5000 more.

Q. Now you had been carrying that at the request of the Kendrick State Bank as a note of J. W. Bradbury. What did you take then?

A. We took a note for \$10,000 and placed the money to the credit of the Kendrick State Bank. The First National Bank had from time to time collateral security as indicated by this correspondence in addition to the certificate of deposit and the note of Mr. Bradbury.

I do not know what was done with this collateral security. We do not have it now. It has all been returned.

Examination by the Court.

We never took any note from the Kendrick State Bank except as you might call their certificate of deposit a note. That is all we had from them, and upon that certificate of deposit we advanced moneys to them, that is placed it to their account, and they could draw against it as they desired.

Direct Examination Continued.

It is not customary for banks, not as a bank to issue

their promissory note. This is not the only bank in the northwest that borrows money; that is an ordinary transaction. They borrow in various ways. Sometimes they will borrow it on certificate of deposit; but if for reasons they don't want to issue their certificate of deposit, the president will give his note or the vice president, or some of the directors will give their personal notes. Money is not loaned to banks without receiving any paper of any kind, either certificate or note; we always take something, but it is done in the way just outlined.

There was never any agreement between ourselves and any of the parties, either the Kendrick State Bank or Mr. Bradbury that the First National Bank would release or did release the Kendrick State Bank from obligation on account of the moneys advanced by the First National Bank. We never agreed to take Bradbury individually for the money that the Kendrick State Bank got from The First National.

Cross Examination.

I think at the time this \$5000 loan was made originally the entire transaction took place by correspondence; I am not sure but I believe so.

I cannot remember, when that first \$5000 was loaned and the certificate of deposit from the Kendrick Bank was taken to evidence the loan, whether from that time on the entire transaction between the two banks was by correspondence, until the fall of 1911, when Mr. Bradbury had this conversation that I

have just related. I might have seen Mr. Bradbury. I don't remember any other talks or verbal negotiations, other than the one in the fall of 1911.

The first application made for an increase of this loan from \$5000 to \$10,000 was in December 11, 1911; I think it was in the form of a verbal request from Mr. Bradbury at the time he came down. He held these negotiations with me; they did not take place partly with Mr. Mills. They were all with me.

I cannot say when we surrendered up the collaterals that were given on the first loan; I am unable to say if it was prior to the time that Mr. Bradbury came down in the fall of 1911.

Q. Well, those collaterals consisted of this certificate of deposit for \$5000 and certain notes payable from individuals to the Kendrick State Bank, didn't they?

A. The certificate of deposit was not collateral. The certificate of deposit evidenced the loan.

That was the evidence of the loan itself. And as collateral to the loan the First National Bank took certain notes of individuals payable to the Kendrick State Bank.

I cannot say whether at the time that the form of this loan was changed, on the face of it at least, and the note was given by Bradbury individually to the First National Bank, those collaterals were all surrendered. I have no figures in front of me, and I cannot remember those things. The bank did take Mr. Bradbury's individual note for \$5000 before the

loan was increased, and in addition to that note, Mr. Bradbury gave as collateral certain stock of his in the Kendrick State Bank.

I cannot say that the correspondence shows that at that time the collaterals which had been given on the original certificate of deposit were surrendered up. I know that those collaterals were surrendered up.

In response to the questions put to me by Defendant's counsel, I have testified that the First National Bank did not accept Bradbury individually on this \$5000 note, but continued to hold the Kendrick Bank.

Q. How do you reconcile that with the fact that the First National Bank accepted his individual stock in the Kendrick Bank as collateral to his note?

A. Well, I have said that it is customary for the officer of a bank to borrow money for the bank.

Q. Yes. Now, then, if he borrowed that money for the Kendrick Bank, explain will you, how the First National Bank was getting any additional security by taking stock in the Kendrick Bank itself? In other words, how would that be any collateral security any more than if I gave you a note for \$100 and should give you my additional note for another hundred? That would not be considered collateral, would it? In other words, it would not strengthen the obligation or security would it? In other words, it would not strengthen the obligation or security, would it?

A. It ought to strengthen it. It should strengthen it, yes.

Q. Why? If your claim was against the Kendrick State Bank, how did stock in the Kendrick State Bank give any additional security for the claim? How can you explain that? You already held the bank and all its assets, if it was a loan to the bank didn't you?

A. Yes.

I should think it would give additional security to our bank to have Bradbury's stock in the Kendrick Bank; I would think it would.

At the time the form of this loan was changed, it was done at the suggestion of Mr. Bradbury, in order to cover up the fact that the Kendrick Bank was borrowing money from banks; and the First National Bank was apprised of that fact, and knew that fact, and assisted him in this transaction to carry out that purpose.

At the time we changed the form of this loan, we did not call for any evidence of authority on the part of the Board of Directors of the Kendrick Bank to Authorize Mr. Bradbury to give his individual note for this loan in place of the obligation of the bank. We didn't ask for anything of that kind. It is not always customary under such circumstances, for the bank to require evidence of that nature. We went upon the theory, that Mr. Bradbury as president of the bank, had authority to borrow money for the bank on his personal obligation.

I don't know as that is the custom of banks in general to do that; it is sometimes done. We often call for evidence of the action of the board of directors;

sometimes do. We didn't in this instance. We don't always do it.

I knew nothing about Mr. Bradbury's affairs, whether or not he was supposed to be perfectly solvent at that time; I didn't consider him at all.

Q. You would not accept his individual note if you had not, would you?

A. I accepted that note for the Kendrick State Bank.

It is customary for banks to take the individual note of the president for a loan to the bank. It is done quite frequently. Our bank has done it frequently.

As a rule, I think we would in that event also take stock in the bank itself to whom we are giving credit, as collateral; sometimes we have nothing else.

So far as we knew, these notes that we surrendered up at the time we took Bradbury's individual note and his stock in the Kendrick State Bank, the notes formerly held as collateral, which we surrendered up were supposed to be good.

Q. What was the form, Mr. Newkirk, on the books of the First National Bank of the loan made for this \$5000 and this \$10,000? What was the nature of the account? How did it stand?

A. Well, I haven't looked but I think the first loan read the Kendrick State Bank, and I am of the opinion that the second one read to J. W. Bradbury, it being in his name.

I think the first loan was credited to the Kendrick State Bank, the second one was in the name of Brad-

bury, and carried that way on the loan book.

Q. State whether or not, Mr. Newkirk, at the time that Mr. Bradbury negotiated this additional loan of \$5000 with you, whether he did not tell you—

Defendant's COUNSEL: My associate has called my attention to something Mr. Newkirk said. I didn't understand it that way. Did you, Mr. Newkirk say that at the time this loan was increased to \$10,000, the money was placed to the credit of Bradbury?

A. No sir.

Defendant's COUNSEL: Well, I thought not. Placed to the credit of the Kendrick Bank.

A. Yes sir.

I did not say a little while ago that at the time the first \$5000 was loaned, the credit was given the Kendrick Bank on the Books of The First National Bank and that afterwards the account was changed to Bradbury.

Q. What did you say; I understood you to say that?

A. Tell me what you asked and I will try to answer it.

Q. I asked you in what form this account stood on the books of The First National Bank, and you said, as I understood it, that you thought it stood originally in the name of the Kendrick Bank and was afterwards changed to Bradbury?

A. No sir, I am talking about one book and you are talking about another.

Defendant's COUNSEL: That is a mistake?

A. That is a mistake of mine.

What I meant was that in the loan department, where we keep a record of these loans, that first loan went under the heading, there in that little ticker we keep, of the Kendrick State Bank, and the second loan probably went to Bradbury; but the proceeds of that loan were placed to the credit of the Kendrick State Bank.

That would be the ordinary way of handling the transaction, if as a matter of fact, Mr. Bradbury had borrowed \$5000 himself, on his personal note, of the First National Bank.

Q. That is the custom of the Bank? In other words, if a man from Kendrick Idaho, came down to Portland and borrowed \$5000 from the First National Bank on his individual note, the First National Bank for convenience, would transfer that to the Kendrick Bank account, if he kept his account in the Kendrick Bank, wouldn't it?

A. I don't believe I understand that.

Q. Well, as I understand you, you say that this second loan was probably in the name of Bradbury in the Loan Department?

A. Yes.

Q. But the credit on the books was transferred to the account of the Kendrick State Bank.

A. It was placed to their credit, yes.

That was done because he borrowed the money for the Kendrick State Bank.

If we had seen fit to make the loan and he asked

it, it would have been done so as a matter of fact, if he had lived in Kendrick and had his personal account with the Kendrick Bank and had requested it to be run through the Kendrick Bank account.

Q. It would be the natural way?

A. We would have done what he wanted done with it.

Certainly if he had requested it, if Mr. Bradbury had been an individual, and not president of the Kendrick Bank, but had an account in the Kendrick Bank in Idaho, and had borrowed \$5000 of the First National Bank in Portland, and instead of taking the money with him out of the bank had left it there, that bank, instead of opening a personal account with him, would have credited the Kendrick Bank of Idaho, with that money.

Q. That is the ordinary way under such circumstances?

A. It is often done.

Defendant's COUNSEL: I call your Honor's attention to this point. Mr. Newkirk says, "If it is requested so," but you don't put that in your question. If Bradbury requested it to be charged that way, or done that way, it would be done; and if he did not request it, it would not be done that way.

WITNESS: I cannot say, when Mr. Bradbury got this \$5000 credit, and his note was given, whether any deposit slip or credit slip was given to him by the First National Bank. Sometimes there would be and sometimes not. Naturally, if it was not given to him,

it would be sent to the Kendrick Bank, at Kendrick. And the Kendrick Bank account would be credited with that amount of money.

Examination by the Court.

I said that the Bradbury note was carried in the loan account. It was carried just the same, I think, as if the loan was made to him.

Q. Then what account did you have with the Kendrick Bank?

A. Well, because he was acting for the Kendrick Bank and as an officer of such bank, his bank is supposed to stand behind the loan we made; we credited the money of the bank and understood all the time that it was a loan to the bank.

But I think we carried it as a loan to Bradbury.

Cross Examination Continued.

I did not at that time, tell Mr. Bradbury that we expected him to keep a balance in the Kendrick Bank in his personal account equal to this \$10,000.

I supposed that he would deposit, or intended to deposit that \$10,000 to his personal account in the Kendrick Bank. That is about the only way it can be carried.

That is, I supposed that he would deposit the \$10,000 to his personal account in the Kendrick Bank, and that then the Kendrick Bank would deposit it, or the same as if they had deposited it in the First National Bank, they already had credit for it. This \$5000 note of Bradbury's was given in place of the

certificate of deposit. Then later on Mr. Bradbury asked for an additional \$5000, and gave a new note for \$10,000 signed by himself, and the old notes were surrendered.

Probably, presumably, when that \$10,000 note was given, the collateral originally held by the bank on the \$5000 certificate of deposit had been returned, but I cannot remember.

All that the First National Bank held at that time was this \$10,000 note of Bradbury's and Bradbury's stock in the Kendrick Bank as collateral of it. At the time when this \$10,000 note of Bradbury's was taken, there was nothing on the books of the First National Bank to show that the Kendrick Bank was indebted to it. There was an understanding between Mr. Bradbury and myself however. Nothing aside from your verbal understanding. Nothing except between myself and Mr. Bradbury.

Re-direct Examination.

Q. Mr. Newkirk, about the entries on these books, I am not very clear about that. Is there anything on the books of the First National Bank indicating that there is a charge made against Bradbury at the time this \$5000 note was taken, or the \$10,000 note was taken? Does your ledger show a charge against Bradbury for that amount?

A. Bradbury had no account with us.

Q. There was no entry against Bradbury in any of your books?

A. Only—

Q. What appears on your books?

Plaintiff's COUNSEL: He started to answer that question.

Q. Just go ahead and explain the whole thing. Show what your books show.

A. In our Loan Department, if we make a loan, we have a book in which we head the loan—to John Smith, for instance, at the head of the Smiths; make it to a bank we put it under the head of Bank. That is all there is to it. It is a little memorandum book. But that does not refer to the general books of the bank.

That was a memorandum showing that we had J. W. Bradbury's notes, first for \$5000 and then \$10,000. That was absolutely the only entry on any of the books of the First National Bank concerning the Bradbury note or notes.

Examination by the Court.

That note of Bradbury's was given the bank—the president—our bank for \$10,000; and we honored drafts on our bank from the Kendrick bank because of that transaction.

Re-direct Examination Continued.

Plaintiff's counsel called my attention to the time the loan was increased from \$5000 to \$10,000 and asked about Mr. Bradbury requesting the increase. Mr. Bradbury came to us from and represented himself as acting for the Kendrick State Bank. Our

transaction was with him as president, and for account of the Kendrick State Bank.

Plaintiff's COUNSEL: That is a conclusion, your Honor. We are not quite as strict about this testimony as if a jury was here.

Re-cross Examination.

The court asked relative to our crediting the Kendrick Bank with that \$10,000 and their drawing on it in the usual course of business, etc.—the Kendrick Bank. The First National Bank was acting as reserve agent for the Kendrick Bank here in Portland. That is correct.

Q. And in the course of business, it drew on its reserve account and replenished it, so that it fluctuated, sometimes as high as \$10,000 sometimes as low as \$100. That is true, is it not?

A. Well, I couldn't say as to that.

Q. But they did business with the First National Bank for quite a number of years, and that is the way the business was done.

A. The account fluctuated.

Q. These papers then I hand you, if you will state what they are please.

A. That is a statement of account issued by The First National Bank of Portland, statement of Kendrick State Bank's account.

Q. Both of them are?

A. Yes sir.

Plaintiff's COUNSEL: We will ask to have these

marked for identification, and we will offer them in our case in chief.

Plaintiff's Exhibit 2.

Kendrick State Bank Kendrick, Ida., in account with
The First National Bank of Portland, Oregon.

[illegible]

Plaintiff's Exhibit 3.

Kendrick State Bank, Idaho, in account with
The First National Bank of Portland, Oregon.

Dr.				Cr.			
Dec. 18	14817	98.62	Dec. 18	107.09	Dec. 18-11	Bal	12882.04
	R 13	8.47		19	38.50	28 Int	18.76
19	" 14	38.50		20	139.08	Jan. 13 10	1702.07
20	" 18	139.08		21	13.54	15 11	2000
21	" 16	13.54		26	34.95	1 12	1054.33
26	" 20	19		27	123.91		
	" 21	15.95		29	100		
28	" 26	108.91		30	2061.54		
	23	15	Jan. 2	10			
29	18	100	3	136.55			
30	R 29	65.65		6	1539.73		
	19	1995.89		9	313.77		
Jan. 2	R 29	10		10	125.76		
3	" 20	136.55		11	2702.05		
6	4	59.74		12	4416.69		
	22	1479.99		15	62.38		
9	R 6	313.77		15	5691.66		
10	" 8	125.76		17657.20			17657.20
11	14823	2742.05					
12	24	4416.69				Bal. Jan. 15,	5691.66
15	R 9	42.98					
	" 10	1940					

Red Ink Notation.

Our Bal Jan 15, 1912	5753.11
Int.	18.76
L 12	10
L 11	5.45
14825	444.34
	6231.66
Our remit. 1-12-12 not credited	5.4
	540
	5691.66

Q. Now Mr. Newkirk, relative to this credit of \$10000 in your bank, to the credit of the Kendrick State Bank, I will ask you if it is not a fact that had Mr. Bradbury, at the time that he gave you this \$10,000 note, taken the money from you in gold coin, taken it to Kendrick, deposited the amount in the Kendrick Bank, and the Kendrick Bank had then forwarded the same to you as its reserve agent, that transaction would appear identically on the books of your bank as it does appear?

A. I think it would.

You understand from my testimony and from the correspondence, the object of changing the form of this loan was so that it would not show the liability of the Kendrick Bank.

Q. Now, in the form that the loan stood then, after the cancellation of the certificates of deposit and their return, and after the taking of the note from Mr. Bradbury, was that loan in such a shape that Mr. Bradbury could truthfully make a sworn report to the Idaho Bank Commissioner that there was no liability owing by his bank to the First National Bank of Portland?

Defendant's COUNSEL: We object to that question. That, it seems to me, calls for the witness' conclusion, and it is for the court to pass upon eventually in this case; and then that is a matter for Mr. Bradbury and his own conscience. It is not for Mr. Newkirk to say what he could truthfully swear to. It is a question that this witness cannot answer.

Objection overruled, and defendant excepted to such ruling.

A. Well, I don't know. I am not certain.

Q. That is the best answer you can make to that question?

A. Just let me think about that a minute.

Q. All right, sir.

A. Yes, I won't change that. I don't know.

I think I have already testified, that I considered the taking of Mr. Brandbury's personal stock in the bank as collateral security to the loan of the bank itself as an added security, that it increased the security and made it better.

Q. Will you please explain to the court on what theory you base that, that the taking of the stock of the bank as collateral security for a loan of the bank itself increases the security?

A. Well, that stock might have some value more than showed on the face of it. If it came to selling out, somebody might want it, and might be willing to pay a premium for it.

It is a fact that if I have the obligation of the bank, I have all of the stock as well as all of the assets of the bank.

Q. Then the taking of this particular stock would not increase the security, would it?

A. Just as I have told you—that might be worth something. Somebody might want that stock—might be willing to pay for it.

Q. I see. But if you have the obligation of the

bank, you could sell everything that the bank owned, could you not, in order to recover on it?

A. We could after a lawsuit, yes.

Examination by the Court.

Q. At the time you took the note of Bradbury, do you say you put that on the note account in the bank?

A. We carried it in with the notes, yes sir.

Q. Yes, carried it in with the note account?

A. Yes sir.

On the taking of that note, we passed credit to the bank in Idaho on the faith of the note. That was the idea in taking the note.

Re-cross Examination.

Q. If the loan had been made to Mr. Bradbury personally, and the money was to be deposited by him in the Kendrick Bank to his personal account, and he asked you simply to credit his bank with the amount, you would have gone through exactly the same transaction, would you not?

A. The result would have been—

Defendant's COUNSEL: That question was asked and answered this morning, that identical question. We object to it as incompetent and immaterial. There is no such transaction before the court.

Objection overruled, and defendant duly excepted.

A. The result would have been the same.

Q. This note account on which the note of Bradbury was entered in the bank, what is that, a book?

A. Well, we have no such thing as a note account.

We have our bills receivable.

Q. You said that when this note of Bradbury's was taken, it was entered in some book in the bank. What book do you call that?

A. Well, that is a bills receivable ledger.

Q. That is just as much a book of the bank as any of the other books of the bank?

A. No, it is not one of the general account books of the bank. It is a memorandum pertaining to that department.

(Excused.)

Telegram received by the First National Bank of Portland from V. W. Platt, State Bank Commissioner of Idaho, dated Feb. 8, 1912, offered in evidence and marked Defendant's Exhibit R.

Defendant's Exhibit R.

First Nat. Bank, Portland, Ore.

This is to advise you that the Kendrick State Bank, Kendrick, Idaho, is now in my hands for liquidation and that balance due this bank as shown by your books to be held subject to my orders forward detailed statement closes business today.

V. W. Platt, State Bank Commissioner.

ELLIOTT CORBETT, a witness on behalf of defendant, testified as follows:

Direct Examination.

I am connected with the First National Bank in the capacity of Assistant cashier. I think I was such last January or February a year ago. I was assistant note

teller and then assistant cashier. About that time the change took place—I believe the first of January.

I heard you read the telegram from Mr. Platt, bank commissioner of Idaho. I am familiar with that telegram; I received it as one of the officers of the First National Bank.

Q. What did you do in pursuance of that telegram? What investigation did you make about the bank—just a general statement about its condition?

A. After we received the telegram—I believe the telegram asked for a statement, we merely sent a statement. The auditor made out a statement and forwarded that to the Bank commissioner.

I went to Kendrick to make investigation as to whether the State Bank of Kendrick was at this time solvent or insolvent or in the hands of the state bank commissioner. I found that the state bank commissioner had taken charge of its affairs. I returned about three days later, I don't remember the date.

When I returned from Kendrick, and after making my investigation, the deposit to the credit of the Kendrick State Bank in the First National Bank I charged on the note that we had from the Kendrick Bank signed by J. W. Bradbury. This note represented a loan to the Kendrick State Bank of \$10,000.

I heard Mr. Newkirk's testimony this morning. That is the same loan he referred to.

When I went to Kendrick, I saw the parties that were interested in the Kendrick State Bank and had a conference with them about the affairs of the bank.

Q. And about moneys due the First National Bank?

A. The Depositors' Committte, I believe, was meeting at the time in the Kendrick State Bank.

I talked with them.

Q. What did they say to you about it?

Plaintiff's COUNSEL: Objected to as incompetent and hearsay, and they have no authority to bind or represent the bank. There is no pleading to that effect, and besides, whatever they said could not change the legal character of this transaction, could not constitute a waiver, or anything of that kind, on the part of the bank. If it is offered for that purpose, then it is inadmissible under the pleadings, there being no charge of that kind in the answer.

COURT: I am inclined to think you are right about that, but I will allow the evidence to come in under the same ruling as made this morning, and reserve the question. To which ruling plaintiff duly excepted.

Q. State what took place at the meeting.

A. I went to Kendrick, and upon arrival there called at the bank and the bank examiner had it in charge. I believe his assistant was then in charge. And they were sorting out the notes and classifying them, the assets of the bank, as to whether they were good, slow, or bad. And I asked them what there was there, what salvage there was for the First National Bank, what I could get, and they were not prepared to say at the time. Later on in the afternoon I again

went there, and they offered me notes which they had culled out of a pouch, which I knew nothing about, and after learning what they were, I then asked Mr. Bradbury if there was any value to them. He said that there was no value whatever, and I let the matter drop.

I don't believe there was anything said at that time by any of the parties there that the First National Bank hadn't any claim against the Kendrick State Bank; going upon the train was possibly the only suggestion as to that by the bank examiner. I went up from Lewiston with the bank examiner on the train. And he was the one that suggested it.

Q. That there might be some objection to the First National Bank; but at this meeting of depositors who were looking after the affairs of the bank, there was nobody disputing the bank's claim?

A. No, no.

Cross Examination.

Q. I suppose you knew nothing at all about what authority these people had to represent the bank, except the statement made by some of them that they represented the depositors?

A. Well I knew that one was acting for the Bank examiner as receiver; he was Mr. Platt's assistant. This was very shortly after the bank had been taken possession of by the commissioner.

It is not a fact that instead of this proposition having been made by the representatives of the depositors and the bank commissioner at that time for a settle-

ment of the claim of the Portland bank against the Kendrick Bank, it was offered for the purpose of getting possession of the stock of the Kendrick Bank which was held by the Portland Bank as collateral, and for the reason that they desired that stock because they intended to reorganize the Kendrick Bank, and needed it for that purpose. Nothing was said at that time about the stock whatever. That was not brought up until the afternoon at the time I was leaving, when Mr. Platt wished the stock, and I suggested that he come to Portland, or that I would send it to them; that, as far as we were concerned it was valueless.

He desired the stock to reorganize, I imagine. He stated that purpose to me at that time.

I arrived in Kendrick in the morning, sometime in the morning and left in the afternoon. It was in the afternoon of the same day that he stated the purpose for which they wished that stock returned. I came back to Portland that night. Mr. Platt did not come down with me. I believe he came later. He came in to Portland, I don't know whether it was the next day or two days later. He saw me at that time. He requested this stock of the Portland Bank then. I did not offer to give him the stock provided he would permit the Portland bank to charge this balance off against this note. He didn't make that proposition.

Mr. Platt arrived in the evening, and he came to the bank, and I had kept the stock out of the vault

prepared to give it to him, and handed it to Mr. Platt and notified him at the time that I handed it to him that during bank hours of that day we had charged the balance to the account against the note.

He did not make the request that he be permitted to take the stock back on those conditions. I did not put those conditions to him at all. He did not take the stock?

Q. No, the Portland Bank kept the stock?

A. He didn't want it. He wouldn't take it.

Q. I say, the Portland bank kept the stock?

A. It remained there yes..

It is not a fact that the Portland bank kept the stock because he would not agree to those conditions. We did not put those conditions to him.

I made the statement in my direct examination that this note of \$10,000 of Bradbury's was for an indebtedness of that amount of the Kendrick Bank to the Portland bank; evidence of the indebtedness.

Q. On what theory do you base that? How do you know that?

A. It was always understood as such.

It was understood between the bank and the Kendrick State Bank. No such agreement was ever made with me personally. All I know about it is what I knew from the cashier and from the fact that I was at that time in the note cage. From the fact that at that time I was in the note cage and considered it a renewal of the Kendrick note.

Q. What I am trying to get at is, on what basis or

fact you base that theory. Now, you said partly on statements made to you by Mr. Newkirk? That is correct, is it?

A. Yes.

And on my own knowledge of the transaction; I knew that Mr. Bradbury had come down there to increase the loan for the Kendrick State Bank; I did not hear him say that. All I know about that actual transaction is what Mr. Newkirk told me. That is the fact of the matter.

Redirect Examination.

The stock of the Kendrick State Bank has been returned to that bank. I did not mean to have counsel infer that we still hold the stock.

Recross Examination.

That was returned some time later. I don't know the exact date.

Q. Quite awhile later, after the transaction that you have related? Some time after that, wasn't it?

A. Some time after that, yes.

Defendant's COUNSEL: March 12th, wasn't it?

A. I am not sure of the date.

On this trip that I made to Kendrick that I have testified, I ascertained at that time, from the figures that were shown me, that the Kendrick Bank was practically insolvent, and I came to that conclusion. I did not also investigate the financial responsibility of Mr. Bradbury at that time. I didn't make any inquiries about his responsibility.

I was to investigate the validity, or rather the responsibility of the bank to the First National Bank, to ascertain how good our claim was.

And I knew that the evidence of that claim consisted of the personal note of Bradbury. And I have testified that that note was given for that debt of the bank to the First National bank. And still I didn't investigate the financial responsibility of Bradbury at all, because I didn't consider that Mr. Bradbury was indebted to us at all. It was always understood that it was the Kendrick Bank. I was not instructed to investigate Mr. Bradbury's financial standing when I made the trip. I did not talk over with Mr. Newkirk, before I made the trip, the purpose for which I was making it. He just sent me up there to see in what shape the Kendrick State Bank was.

Q. Yes. And when you went up there you knew what evidences of this debt were held by the First National Bank, didn't you?

A. I knew what?

Q. What securities or evidences to cover the debt the First National Bank held?

A. Yes.

The very purpose of a trip like that would be to ascertain how good the paper or other collaterals held by the First National Bank might prove to be. That is a fact.

Q. And did you then consider that this note of Bradbury's was one of the collaterals that the First National Bank held for that loan?

A. One of the collaterals?

Q. Yes.

A. That was the note of the bank itself.

Q. I know what it was. I am asking you whether or not you considered at that time that this \$10,000 note of Bradbury's was a collateral to assist in the securing of that claim of the First National Bank against the Kendrick Bank?

A. No, I didn't consider it as a collateral.

I didn't investigate his responsibility for the reason that I didn't recognize Mr. Bradbury as an individual in that at all.

If the Portland Bank had held Bradbury's note of \$10000 as one of the collaterals for this indebtedness, naturally I would have considered it my duty to investigate his standing.

Q. And you would have done so. That is all.

(Excused.)

J. W. BRADBURY, called as a witness on behalf of the defendant, testified as follows:

Direct Examination.

I am the J. W. Bradbury mentioned in the testimony in this case and was president of the Kendrick State Bank at that time. I was elected president in December 1904; I took over the bank; some one else had it at that time, and I was elected president and remained president up to the time of its suspension. I was president, then, on June 11, 1910.

Q. A letter has been introduced in evidence here,

dated June 11, 1910, signed by you as president, and directed to A. L. Mills, of the First National Bank of Portland, Oregon, which you heard read, I take it. Do you remember the occasion of your writing that letter asking for this \$5000 credit?

A. Not definitely. I remember in general that I wrote such a letter. I could not recall the words.

The First National Bank of Portland had been our correspondent before that time. On this date, June 11, 1910, I simply wrote to the First National Bank of Portland, telling them that I needed to make a loan of \$5000. I received an answer, I don't remember the date, that they would allow me to make the loan.

Q. State if that amount was kept on deposit, substantially, by your bank from that time on up to the time of the increase of the loan later on.

A. You mean, did the balance amount to that much?

Q. Practically so, yes?

A. Well it fluctuated back and forth. Part of the time I possibly overdrew that amount.

The money was deposited down here to the credit of the Kendrick State Bank, and checked against by the Kendrick State Bank, and the Kendrick State Bank also deposited at times. And kept an open balance there. When that loan matured, it was continued. I don't remember how often. I don't remember whether the C. D's. were made for three months or six months.

Q. Well, the record shows that it was continued

up to December 6th, and then a letter from you is introduced here of December 6, 1910, asking for a renewal for six months.

I recall that circumstance. And it was renewed. You read that portion of the letter to me, which has been introduced in evidence: "We are writing you on another sheet for this to be carried in another way with our reasons for asking for the change." I recall writing that.

Q. And then upon the other sheet there is a statement with reference to changing the form of the account. State to the court now just what occurred between you and the bank here with reference to that.

A. Well, I think the body of that letter covers it all. I simply wrote and told them my reasons for changing the form of the loan, and asked them might I have that kind of accommodation.

And they agreed to it. It was never, at that time or any time agreed between the First National aBnk and myself that the account against the Kendrick State Bank should be released. There was never any such agreement as that.

Q. These transactions that I have called your attention to took place in 1910. Now in December, 1911, this account was increased from \$5000 to \$10,000. Do you remember that occurrence?

A. Yes sir:

I needed an extra accommodation of \$5000 and I made a trip down here especially to see Mr. Mills or Mr. Newkirk, of the First National Bank. I told

them the situation I was in, I wanted to borrow the money and make the loan for \$10000, made an increase of \$5000 over the original loan.

When I say "I" I mean myself as president of the Kendrick State Bank. I made the trip and I made the arrangements with the First National Bank to borrow the money. That increased sum, the extra \$5000, was borrowed for the bank.

At the time I made that arrangement with Mr. Newkirk or Mr. Mills, or whoever represented the First National Bank, it was not agreed between us that the account against the Kendrick Bank should be released at all.

At that time I gave a note to the First National Bank. And the money was deposited in the First National Bank to the credit of the Kendrick State Bank and was utilized by the bank in checking against it. As president of the bank, I knew it was there.

Q. One of these letters, perhaps several of them, one of them, at all events, is signed by you individually. Can you recall that letter? It is upon the Kendrick State Bank paper. I will ask you now to state, was that letter signed by you as an individual or did you intend it as the act of the president of the Kendrick State Bank?

Plaintiff's COUNSEL: Objected to as contradicting the written instrument, or attempting to.

Defendant's COUNSEL: You don't object on the ground of not having identified the letter?

Plaintiff's COUNSEL: No. It is objected to on

the ground that parole evidence is inadmissible to vary or contradict the written letter. It is not ambiguous, and shows on its face just what it means.

Objection overruled, and ruling duly excepted to by plaintiff.

'Q. I will ask you to state, Mr. Bradbury, in answer to that, with reference to several of these letters, some of which were signed by you individually, were they intended by you to be the act of the Kendrick State Bank by its president?

A. They were.

I did not have any arrangement with the First National Bank individually. Not at all at any time.

The Kendrick State Bank paid the interest on these notes from time to time as it fell due. The Kendrick State Bank paid the First National Bank. And the account was carried that way up to the time the bank closed. I don't know whether or not I, individually, ever paid any of this interest. Some of the times I would charge interest out of my own account on different obligations I had, and part of the time I charged it up to expense. These things could be checked back and found.

Q. There has been some testimony introduced here with reference to certain stock of the Kendrick State Bank owned by you, and deposited by you with the First National Bank. Tell the court what became of that stock.

A. The First National Bank of Portland returned it to me, and I turned it over to Mr. Martin V. Thom-

as, now president of the Kendrick State Bank. He is now the president of the Kendrick State Bank.

Q. Well, who was he then?

A. Well, that is a question. At the time that I turned it over to him, under certain form he was president, but I think that that was all done away with, and I don't think he was anything except one of the depositors, one of the committee of the depositors.

I turned that over to those people, at the request of the committee of depositors. They said they wanted it because it would expedite the reorganization of the Kendrick State Bank. They were then in process of reorganization. Had they not got that stock, they would simply have had to liquidate it, and form a new organization, and kill that stock off, and organize and reissue it.

So they took my stock that was down here with the bank. All of it, and I got nothing for it.

At the time the Kendrick State Bank closed, there was a credit due me of something over \$10000, ten thousand one hundred and something, I believe, if I remember rightly.

When it closed and these people were in the process of settling it up and reorganizing it, and negotiations were going on between us, I told those people whose money that was.

Q. What money did you say it was?

Objected to as incompetent. Objection overruled; exception taken by plaintiff.

Q. You may state Mr. Bradbury, what you told

them about that money that apparently was yours?

A. I told them that the money did not belong to me, that it was the First National Bank of Portland's money.

I told them that on two different occasions that I know of, one time when the committee waited on me at my home, and another time when I was up in the Kendrick State Bank's office.

I don't remember just how many days after the closing of the bank the first conversation took place. It could not have been many, probably two or three, a couple of days, something like that.

As a part of that conversation and the transaction that occurred there, I signed a check in favor of Mr. Thomas for the \$10,000. Checking out to them all the money that was in the Bank in my name. This check was signed in the Kendrick State Bank office, at the second interview. At the time I signed the check, I had told them twice whose money it was.

I didn't get anything for that check that I signed to them. I didn't turn over the stock at that time. They had part of the stock in the bank. This Portland stock was some time later getting up there. I turned it over later on. There was nothing else turned over to them, I didn't have anything else.

So then the situation was that they took all I had, bank stock and everything, and the money that stood to my credit in the bank.

Q. And now the claim is that this is your debt to the First National Bank, is that it?

A. I don't know what they think about it.

Q. Well, I don't either.

Plaintiff's COUNSEL: If that was all, that would be it. But that is not all.

Cross Examination.

I got nothing for that check, I say.

Q. This is the check, isn't it?

A. That is the check.

Check introduced in evidence and marked Plaintiff's Exhibit 4, as follows:

Plaintiff's Exhibit 4.

Kendrick, Idaho, 2-12 1912. No. 270.

KENDRICK STATE BANK

of Kendrick, Idaho

Pay to the order of Martin Thomas trustee, \$10000.00

Ten thousand no-100 Dollars. J. W. Bradbury

Endorsed on face: Paid Apr 9, 1912, Kendrick State Bank, Kendrick Idaho.

(Endorsed on back as follows:)

Note, H. E. Abend, \$5000.00

Note A. Bradbury 5000.

Note L. P. Bradbury 5000

Note J. W. Bradbury 5000

Note P. E. Buntin 2500

Note Geo. K. Reed 2500

This check to become available on delivery of above mentioned notes to J. W. Bradbury. Endorsed by Martin V. Thomas trustee.

Q. You have just stated with reference to Plain-

tiff's Exhibit 4 for identification, that you received nothing for this check. I will ask you to read the indorsement on the back of the check.

A. "Note H. E. Abend, \$5000. Note A. Bradbury \$5000. Note L. P. Bradbury \$5000. Note J. W. Bradbury \$5000. Note P. E. Buntin \$2500. Note Geo. K. Reed \$2500. This check to become available on delivery of above mentioned notes to J. W. Bradbury."

That indorsement is in my handwriting. Those notes were not delivered to me.

Q. Haven't you ever received them?

A. I have.

Q. Then they have been delivered to you, haven't they?

A. Not on that, no sir.

Q. I ask you if the notes have ever been delivered to you?

A. We are talking about that check now, aren't we. Now if the court—your Honor may I digress here and tell the circumstances of this? I don't want to get mixed up on this proposition, or anything of the kind. I want to tell how I got those notes, and in what manner I received them.

COURT: Do you object to that?

Plaintiff's COUNSEL: I think he will have ample opportunity to explain, your Honor.

Defendant's COUNSEL: You may as well let him tell it now.

Plaintiff's COUNSEL: We will get at it. It is simply a matter of procedure.

COURT: How much is that note for?

Plaintiff's COUNSEL: \$10,000.

COURT: Proceed with the examination. You will have a chance to explain later on.

I received the notes that are indorsed on the back here as the check being given for.

No sir, I did not receive something for the check.

These parties whose names I have indorsed upon the back of this check as owing notes for which I gave the check, to-wit, H. E. Abend, \$5000, A. Bradbury, \$5000, L. P. Bradbury \$5000, J. W. Bradbury \$5000, George K. Reed \$2500, and P. E. Buntin \$2500 well, they are relatives and friends.

Yes they are relatives and friends of mine. The Kendrick State Bank held those notes. The notes were given to make up the capital stock.

These notes were not given by these individuals as payment of stock subscriptions to the Kendrick Bank. They were given to take up an old debt of the institution which was running when I took the bank. These parties did not receive stock in the bank as a consideration for these notes.

Some of them were stockholders of the bank. I think at different times probably all of them were, at different times. I think some of them held 500 shares, or \$500 worth.

I could not remember exactly which ones of these individuals were stockholders of the bank at the time that the bank closed. I think Mr. Abend was a stockholder, and A. Bradbury. I don't remember whether

L. P. Bradbury was a stockholder or not. Mr. Buntin was not a stockholder. I was of course. George K. Reed was not a stockholder. The others were stockholders.

Q. I will ask you if it is not a fact that in addition, and as a further consideration for this check, these individuals here whom you have identified as stockholders were released from any stockholders' liability to the bank?

A. Not to me, they were not, no.

Q. Wasn't it understood by and between you and the depositors' committee, or the committee that you did business with in connection with this matter, that the giving of this check would relieve these stockholders from any liability as stockholders?

A. Not from my standpoint, it was not; there wasn't any of those people responsible for any amount of that money.

I didn't consider they were responsible. As far as I was concerned, it was not understood that there would be no effort made to hold them responsible on the giving of this check.

I don't know whether it was understood as far as he was concerned.

There might have been something said about it; I don't remember. I would not say that that was not a part of the consideration.

I say I did receive those notes.

Q. Now you desired to explain awhile ago under what circumstances. You may go ahead and explain

that to the court.

A. I received those notes about one week ago.

The notes were not cancelled at the time of the giving of the check. I know they were not. I have since received the notes. I couldn't say where they were in the interim.

I don't consider I have received consideration for the check to that amount.

COURT: How did that indorsement come to be made on that check?

A. At that time this committee wanted me to turn over this \$10,000 to them, and I objected, and told them the money was not mine. I was acting under the advice of my attorney from Moscow, Mr. Morgan, and he advised me to give them the check for it, for he said, "It don't make any difference anyhow. They will grab this money. It don't make any difference. If they can't get it on this stock transaction or your check, they will simply assess it out of you on the stock, so you might as well give them the check, and let it go at that, and make the indorsement on the check."

COURT: You were a stockholder at that time?

A. Well, I couldn't say whether I would be or not. The bank was then in the hands of a receiver, and the possibilities are that I was not a stockholder. The stock was still in my name.

I owned the stock that was on deposit with the First National Bank here at that time.

Q. As collateral for this note of yours?

A. I owned that stock, yes.

The total amount of the liability as shown by the indorsement on this check was some \$25000. that these parties owed the Kendrick Bank. This check, as I state, was given in consideration of the cancellation of that indebtedness as I have indorsed here on the back.

At the time that I gave my first note, the facts leading up to that transaction are substantially as they are set forth in the communication from me to the First National Bank, that is in evidence here, and that was referred to by counsel in his examination of me. In fact, I had no personal communication with them at that time. It is all contained in that letter.

Q. The end that you sought to attain by changing the form of that loan was that you could make a report to the bank commissioner that would not need to show a liability of the Kendrick Bank to the Portland Bank? Is that not true?

A. Not necessarily. I didn't take the bank commissioner into consideration at that time. I never gave him a thought. I didn't want it published. That was the reason that I made it in this way. Not on account of the bank commissioner, but it was on account of the published statement.

The published statement is simply an extract of the statement that we are required to make under the law to the bank commissioner.

I considered this note of mine an obligation of the Kendrick State Bank. And I always considered that

that was a liability of the Kendrick Bank. I couldn't remember whether I so showed it in my reports to the bank commissioner. The statements will show probably.

Q. If you will just look at those, please.

A. That account doesn't appear. There is one statement here that shows C. D. of the Traders' National Bank, that is included in our time C. D.'s.

Q. Mr. Bradbury did you understand my question? If you will kindly confine your answer to the question, we will get along much quicker. I never mentioned anything about the Traders' National Bank. I asked you if your reports to the Bank Commissioner subsequent to the execution of that note showed any liability from the Kendrick Bank to the First National Bank of Portland.

A. No sir.

I don't think I have an explanation to offer as to how I could swear to such a report as that, in the face of my statement that that was the obligation of the Kendrick Bank.

At the time that I gave my note to the First National Bank, the First National surrendered up the certificate of deposit that it had previously held and all of the collateral, to the Kendrick Bank. And it left the First National Bank holding nothing but my individual note for \$5000 and a certain number of shares of my individual stock in the Kendrick Bank. That is true. I considered that the obligation of the Kendrick Bank.

It is a fact that immediately upon the taking of my note by the First National Bank I entered a deposit to my individual credit in the Kendrick Bank for the \$5000. I did it that way because I might as well enter it in that account as any other. I never considered it as my money.

I have entered other people's money to my credit in that bank. They had reasons for having it done that way and I had reasons for doing it. I had no particular reason for entering the Kendrick Bank's money to my individual credit, only that was the simplest way to carry the account.

Q. If the Kendrick Bank had made the loan, couldn't you carry it as an obligation of the Kendrick Bank?

A. I could have, yes.

Q. You could have?

A. That would have brought me right back to that published statement again.

The idea was to put it in a shape where I could make a loan under cover as it were. That is correct. And I considered it an obligation of the Kendrick Bank though evidenced by my individual note, and the amount deposited to my individual credit.

Then when I renewed this \$5000 note and got \$5000 more, I also put that to my individual credit.

Q. You used this money in your business transactions, your individual transactions, did you not, from time to time?

A. I never touched that balance.

Q. Is it not a fact that your balance was reduced below \$10,000 after you secured the second loan?

A. It might have been; not materially though.

I did check on that account for my individual purposes all the time. That is the only account I had. I don't know whether Mr. Newkirk knew that I had deposited this to my individual credit in the Kendrick Bank. I suppose he did.

I don't think it is a fact that, in my conversation with him at the time that I made the second loan, he stated that he desired me to keep that personal account of mine intact, in order that they could have me give them a check for the amount of the note on demand at any time.

I don't remember any conversation like that. I instructed them to at any time charge the account of the Kendrick State Bank with them with the note.

I don't remember whether he told me that he wanted me to keep my account intact there, that he wanted me to keep the \$10,000 to my credit, so that he could secure the money on demand. He may have. I don't think so.

Q. I will ask you, Mr. Bradbury, if it is not a fact that, in a conversation between Mr. Eastwood, who was then assistant bank commissioner of the State of Idaho, and yourself, had in the City of Spokane in the month of December, 1912, substantially this conversation was had: Mr. Eastwood in discussing this affair said, "Was it understood that the balance in the Portland Bank to the credit of the Kendrick Bank

was to be kept up to the full amount"? And you stated, "No the understanding was that I was to keep my individual account intact, or up to the amount of \$10,000 so that on demand at any time I could give them a check for the amount."

A. I don't remember any such conversation.

Q. Will you say that you had no such conversation?

A. With Mr. Eastwood?

Q. Yes.

A. No, I wouldn't say that I had no such conversation.

But I don't remember it. I have no recollection of it. I had no such understanding with the First National Bank about my personal account. I had an understanding with the First National Bank, or I told them that I would keep that balance there in the First National Bank of Portland virtually \$10,000 at all times, at any time the remittances from Portland came up to the Kendrick State Bank and cut that balance down, that immediately as fast as I could, I would build it up to the \$10,000 mark again, which I tried to do.

Under that \$10,000 loan, that balance of the Kendrick Bank in the Portland Bank was not reduced as low as \$400 at times—not under that \$10,000 loan, I don't think so.

In my report to the Bank commissioner of date September 1, 1911, I may possibly show a balance in the First National Bank of Portland of \$69.56; it must be

if it is there. It was reduced to that extent at that time; and it fluctuated all the way from 69 dollars and something to \$10,000.

Defendant's Counsel: What date was that \$69 balance?

Plaintiff's COUNSEL: That was in September 1911 I think.

Defendant's COUNSEL: Was this after that \$10,000?

Plaintiff's COUNSEL: September 1, 1911.

Defendant's COUNSEL: Before the \$10,000.

Plaintiff's COUNSEL: Yes, but after the \$5000. It was after he got the \$5000.

Defendant's COUNSEL: Oh yes, we don't question that. But I thought that after the \$10,000 it never had got that low.

Some of the interest payments on these notes were charged to the Kendrick Bank; I didn't say that all of them were. As I said, it was a mere matter of my choice that they were not all charged to the Kendrick Bank. Sometimes I charged it to my individual account and some of the time I charged it to expense.

I paid very many of the debts of the bank by charging it to my individual account. I did it because I was the bank; I did as I pleased with it. I treated it as my individual account—the whole business.

Redirect Examination.

I owned \$23000 of stock in that bank. I practically owned it all, except some organization shares. The

capital stock was \$25000. The other was owned by relatives of mine, so that I was practically the bank.

Q. Now there is an indorsement upon this check speaking of the release of certain notes in consideration of the check, and you then repeated, after being shown that, that you got no consideration for the check. I will ask you to explain to the court what those notes referred to on the back of that check were given for, and how you came to be responsible in any way for them. Detail that transaction that took place at the time you took over the bank.

A. Well, when I took over the bank, I took it from Spokane parties. Mr. E. J. Dwyer of the Exchange National Bank, was the main owner of the bank. In fact, he virtually owned the bank the same as I did afterwards. It was in very bad condition, and a friend of his advised me to go up and buy the bank. I told him I had no money. He told me it would take no money to buy it. I went up to see Mr. Dwyer, and he told me, "If you will take the bank, assume the obligations, I will give it to you—give you the stock. There's one or two accounts I must take up that I am personally obligated for down in the bank." So we made the trade. And one of their accounts that they carried at that time was an account called "Bad Debts," that amounted to something over \$26,000. I carried that account along with bad debts as long as I could, and absorbed what little profits I made, until the state appointed a state bank examiner. Then I had to charge those off, those accounts, together with

other bad debts; and in order to make that up I gave my notes and my people's notes to the amount of \$25000 to do that; and these are the notes that have been carried along.

These notes mentioned on the back of that check and my note were given to wipe out that account called bad debts, for which I never got a dollar and my people didn't.

I supposed that Mr. Newkirk knew that this money was credited to my account up there in the Kendrick Bank just from the natural procedure of business. I did not have any talk with Mr. Newkirk about it; there was no arrangement to that effect about it that I know of.

'Q. And counsel asked you if it was not agreed between you and Newkirk that you should keep that account up in the Kendrick Bank intact. Was there ever any such talk as that at all?

A. No sir.

Plaintiff's COUNSEL: He did state there was not.

Defendant's COUNSEL: I was wanting to identify it so to be sure you didn't mean the account down here.

Plaintiff's COUNSEL: No.

I had no conversation with him at all about my personal account in the Kendrick Bank.

There was no other collateral for the \$10,000 note.

Recross Examination.

At the time I bought out this Kendrick Bank orig-

inally as I have testified and these bad debts of about \$20,000 or so stood on the books of the company, you could consider that I bought the stock of the bank. In the trade the stock of the bank was transferred by the former stockholders to me; that is a fact. Not the entire \$25,000. There was some of the stock held. \$25,000 was the capital of the bank at that time. I think probably \$24,000 of it was turned over to me. There was some of the balance transferred back and forth; I couldn't say exactly how it was transferred.

Redirect Examination.

The people who signed these notes never got any consideration for them. They just signed to accommodate me.

Examination by the Court.

I did not have anything to do with the reorganization; I have no interest in the reorganized bank.

At the time I signed this check of \$10,000, or at the time I signed the note to the First National Bank of Portland, I said that I had placed to my credit in the Kendrick Bank, an equal amount. I just simply made a deposit slip for the \$10,000 as deposited in the First National Bank of Portland in my own name. Of course, I didn't deposit any \$10,000, just the credit. I credited my account and charged the First National Bank of Portland for the amount.

Recross Examination.

Q. So, as a matter of fact, it stood on the books just the same as if you had brought the money up

from the Portland Bank and put it in the Kendrick Bank in your own name, and then the Kendrick Bank had deposited it in the Portland Bank in its reserve? That is a fact, isn't it?

A. No, I don't think you would consider it just the same. The entries would be different.

Q. In what respect?

A. Well, in the first place had I brought that money up in gold coin there would have been marked on the deposit slip "Gold coin" for the \$10,000, and Portland would not have been charged.

Q. As a matter of fact, you entered it on your deposit slip by crediting the First National Bank of Portland?

A. I think so.

Q. Substantially that?

A. I think so.

Q. Instead of Gold Coin deposit.

A. Yes sir.

Q. That is the only difference, isn't it?

A. I imagine so, yes sir.

(Excused.)

Defendant rests.

EMMETT E. EASTWOOD, recalled for the plaintiff in rebuttal, testified as follows:

Direct Examination.

I heard the testimony of Mr. Bradbury when he was on the witness stand. I heard the question propounded to him relative to a conversation had with

me in Spokane in December of last year, in which he made a statement to me relative to the understanding between himself and the Portland Bank as to keeping the \$10,000 in his individual account intact.

At that time I was an employee of the State Banking Department, I was deputy state bank commissioner. At the time we turned over the Kendrick State Bank to the new organization, or reorganized the Kendrick State Bank, there were still a number of bad debts left in the account. We had anticipated recovering this amount, this balance that was due from the First National Bank at Portland to wipe out those debts, and as a member of the state banking department, I was urging the Kendrick State Bank to take action to recover this amount, in order to clean up the bank in a condition satisfactory to the State Bank department. I was working in the northwest part of the state in December of 1912, and met Mr. Bradbury in Spokane, in the office of Hallet Bros., with whom he was connected at that time, I don't remember the date, but it was some time in December—and engaged him in conversation about this matter, with a view of finding out how the transaction stood, or how he regarded the transaction. I asked Mr. Bradbury if there was any understanding between him and the First National Bank of Portland that the Kendrick State Bank's balance should be maintained to the amount of the note of \$10,000, and he told me that there was not; that the understanding he had with Mr. Newkirk at the time he ne-

gotiated the additional loan of \$5000 and executed his note for \$10,000 was that his personal balance on the books of the Kendrick State Bank was not to be reduced below \$10,000 in order that he might be able on demand to give his check for the balance that he had there, and thus pay the First National Bank of Portland, which of course would be handled through the Kendrick State Bank.

I heard the testimony of Mr. Corbett when he was on the stand, particularly with reference to the stock that was held by the First National Bank as collateral.

I heard his statement relative to the conversation that he had with me and Mr. Platt and the Depositor's committee at Kendrick relative to the surrender of that, and relative to the tendering to him on behalf of the First National Bank of certain notes.

The transaction was with the idea of releasing the stock that was held by the First National Bank as collateral, in order that we might reorganize the bank. If we had wanted—I am speaking as at the time receiver of the Kendrick State Bank—if we had wanted to pay the First National Bank of Portland, we certainly would not have offered them notes. We would have paid them with the balance that we had on hand here. We as receiver or as the state bank department—none of the members of the state bank department would have had any authority to pay the First National Bank of Portland.

The conversation between Mr. Corbett and Mr.

Platt and I and the members of the Depositors' committee, was simply we were trying to arrange some means whereby we could get a release of the stock that they held, in order that we might reissue it to new stockholders, who had agreed to take the stock and pay in money—resubscribe the capital stock. That was the substance of the conversation.

There was no offer made to pay any obligation to the First National Bank.

I heard Mr. Bradbury's testimony relative to giving this \$10,000 check to Mr. Eastwood. I was party to the general transaction. I heard his statement to the effect that he received nothing for that check.

The Kendrick State Bank held the notes that are referred to, that are indorsed on the back of the check, as a part of their assets at the time the bank was closed by the department. We were laboring at the time with several plans of reorganization. We wanted to reorganize and turn the bank over to these new stockholders. The transaction was really a transaction between Mr. Thomas and Mr. Bradbury, because the Banking department would not have had any authority to have turned these notes back to Mr. Bradbury. But it was agreed between Mr. Bradbury and Mr. Thomas that in the event the bank was reorganized and resumed business, they would turn the notes referred to back to him, provided he would surrender this \$10000 for which he had credit on the books, and for which the Kendrick State Bank was liable to him as depositor, they would surrender these

notes and release them from any stockholders' liability. Under the laws of Idaho, there was an additional liability of 100 per cent on the part of the stockholders. Mr. Bradbury said that he was particularly anxious about his father who was maker of one of the notes, as he was rather an aged gentleman, and he had some property, he had a farm out there in the Palouse country, which was quite valuable, and he didn't want him to become involved in any controversy, or lawsuits, or suits to recover any amount, at his age.

And these notes were surrendered as a consideration of the payment of that check; and they were charged off the assets of the bank when we turned it over to the new institution. I made the entries before I turned it over to them.

I heard Mr. Bradbury's testimony to the effect that there was absolutely no conversation or understanding had relative to the release of any of these stockholders of their stockholders' liability as part consideration of turning over that check.

The facts are that there were a number of conversations relative to the liability of the stockholders. He didn't seem to be concerned in any, however, except that of his father, as I have stated before. But that was a part of the consideration.

As to these notes themselves, they were a liability to the Kendrick Bank. As to what they were given for, I understood in a general way, but I didn't have any personal knowledge as to what they were given

for of course.

Cross Examination.

I could not tell how long these notes have been in the bank without referring to the loan register of the bank, or some of the records of the bank. I went through all of the books of the bank while I was in charge of it.

I could not say whether or not there was ever any interest paid on any of those notes without referring to the bank records.

I do not know what effort was made by the bank to collect them at any time; I was not connected with the bank prior to the time the bank closed. I know in a general way if they were worth anything at the time the bank closed; by a general way, I mean I know that Mr. Bradbury, A. Bradbury, the father of J. W. Bradbury, owned a farm out in the Palouse country there.

I have been told as to what it is worth; personally I would not be able to testify.

Ed Bradbury, a brother of J. W. Bradbury, at the time was owner of practically half of the capital stock of the Lincoln McRae Hardware Company. I have never had occasion to go through the records of that company.

We didn't undertake to collect those notes. We considered them as an asset of the bank while we were in charge, but they were surrendered for a consideration. We permitted the newly organized bank to cancel them and surrender them in consideration

of this \$10,000 that was paid into the newly organized bank to help it carry the losses which the banking department charged out. I consider them worth \$10,000.

I can safely say that I considered that the property that the note makers owned at the time was well worth \$10,000. And we took the check in payment of those notes because the property was worth it.

The transaction with the First National Bank of Portland had nothing to do with our surrendering the notes to John Bradbury. It was in consideration of this deposit of \$10,000 we cancelled and surrendered the notes.

As I stated awhile ago, in reference to the negotiations with Bradbury about those notes, the transaction was principally between Mr. Thomas and Mr. Bradbury, but it was with the consent of the Banking department that we permitted them to do that. I was a party to the deal in a general way. I didn't negotiate it myself. It was our business, because at the time the negotiations was being carried on it was an asset of the State Bank; and the bank was under our orders—we had charge of it.

Bradbury's stock that was down here was later returned to Mr. Thomas by Mr. Bradbury. It was then reissued—resubscribed and paid for. This money was paid it. It was reissued as new stock, and it was paid for in full. It was \$25,000. That was part of the stock that was here as collateral. I don't remember how much it was, the records will probably show.

I don't remember; occasionally I forget things.

I think it was more than \$10,000 worth of stock.

Q. And the result of these transactions, then, among you people up there, whether you were representing the state or whom you were representing, was that the stock that the First National Bank had was got out of its possession and up there, without any consideration, and this \$10,000 they are going to lose, too? That is your idea of banking business, is it?

A. Well, you are asking me for a conclusion about a proposition.

Q. Well you can say whether you consider that a proper way to do or not, or you can decline to answer it if you want to.

A. That is a proposition that might have several interpretations. You might say, on the other hand, that it would not be just for the depositors up there to lose this \$10,000. As a matter of fact, they lost \$25,000 or \$30,000.

Q. But you don't want to answer that question?

A. No, I have no objection to answering it, but it was given in such a way that I didn't just exactly get your meaning. If the stenographer will kindly read it, I will try to answer.

(Question read.)

A. It was not got out of their possession. They gave it up voluntarily. The stock had no value.

It got value when the people put in \$25000 on the reorganization. It was reissued up there. They made the value when they put in the \$25,000. If it hadn't

been got from here, we couldn't have reissued it. It was simply a short cut to the reorganization, the reason we desired the stock.

Redirect Examination.

Mr. Thomas was in a way representative of the depositors. There were several of the depositors that were trying to evolve some plan in connection with the bank department. We were helping them to reorganize the bank, and Mr. Thomas was the prime mover among the depositors to reorganize the bank.

He was a trustee, handles this stock as a trustee for the different parties interested in the reorganization.

That is, it was to be done through him, and the check was made to Mr. Thomas as a trustee when the stock was turned over to him.

Examination by the Court.

We used this stock for the purpose of reorganization. It was simply a short cut to reorganization.

We did not desire to get it clear of the credit which Mr. Bradbury held against the bank of \$10,000—it was a liability of the bank to Mr. Bradbury of a \$10,000 deposit.

Q. Well that was a credit in favor of Mr. Bradbury against the bank?

A. In favor of Mr. Bradbury yes.

Q. You wanted to get clear of that \$10,000 credit of Bradbury's.

A. He wanted to release all these notes that we held, his father's and others.

Q. I am asking you now the question, you wanted to get clear—the reorganization body wanted to get clear of that credit, or the charge against the bank?

A. Well, there wasn't any particular reason as to why we would rather have gotten rid of that credit than any other, your Honor. We had a number of depositors with deposits.

Q. I know that is true, but that was one of your ideas?

A. No.

Q. That was along with getting hold of this stock for the purpose of reorganization, was it?

A. Well, I can hardly say that it was any idea of ours to get rid of the \$10,000. Of course, we wanted the \$10,000—we wanted it to help take care of losses that were there to be taken care of.

Q. After the bank had reorganized, it would have had to pay this \$10,000 if it was not cancelled?

A. Oh yes. If we had not handled the transaction this way, it would have stood on our books as a liability to Mr. Bradbury the same as the liability to any other depositor.

Redirect Examination.

Naturally, if we had kept that credit on the books in that way, and the bank had had to pay the \$10,000 to Mr. Bradbury as it would have done if this settlement had not been made, then on the other hand the bank would have had to enforce the liability of these notes, and the liability of Bradbury's father and these other stockholders whose names are mentioned on

these notes.

And Bradbury didn't want that done in connection with his father. He did pay the \$10,000 to the bank rather than have that done.

COURT: But the First National Bank had nothing to do with that reorganization?

A. No sir.

(Excused.)

MARTIN V. THOMAS, called as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

I am the Mr. Thomas that has been spoken of here. I am the Martin V. Thomas trustee that is named as the payee in this check of Mr. Bradbury's, this \$10,000 check.

I heard Mr. Bradbury's testimony.

I was a party to the negotiations leading up to the reorganization of the Kendrick State Bank. And also a party to the negotiations, the result of which was the giving of this check to Mr. Bradbury.

I did not hear Mr. Bradbury's testimony to the effect that he told me, or possibly the loan committee or others, that this \$10,000 that was to his credit in the Kendrick Bank was the property of the First National Bank of Portland and was not his money.

Q. Did you hear him testify to that here on the stand?

A. I heard him testify to that.

Mr. Bradbury never spoke of its being the money of the First National Bank. He called it his individ-

ual money, and his individual deposit in the Kendrick State Bank.

I heard him testify to the effect that he received nothing for the giving of that check?

He came to us,—he made more than one proposition to us. It was made quite awhile before it was taken up,—that he wanted to get that family paper. He called it the “family” paper,—these notes that is represented a note of on the back of that check; and he would give his personal deposit in the Kendrick State Bank, which was \$10,000 for those notes.

I cannot repeat what was said about a stockholder’s liability that any of these note holders were responsible for. I don’t remember how that talk went.

But it was agreeable to him to give the check for the release of these notes. What he termed the family notes, and especially his father. He wanted to get back his father’s note. He dwelt on that more than anything else. His proposition was accepted. That is exactly what the check was given for.

I am the present president of the Kendrick Bank.

Cross Examination.

I was not a stockholder in the old bank. I was a depositor. I had a deposit of somewhere in the neighborhood of \$1400 when it closed. I had a straight deposit of one thousand and some dollars, and I had C. D.’s that I had bought for the balance.

Q. And when the bank examiner closed the thing, you depositors got together and elected a depositors’

committee?

A. Well, we got together and talked this thing up.

I won't tell right now how many of us were on that committee. I wouldn't state how many was on the first committee. We had two or three gatherings in regard to it, two or three meetings.

Q. Now, when you say Mr. Thomas, that Mr. Bradbury didn't state that that was the money of the First National Bank, you don't mean to say that he didn't state it to some of the members of the committee when you were not there, perhaps?

A. I don't know what he said when I was not there.

What I mean to say is that he didn't tell me. I had heard of the First National Bank account. I heard of it as soon as the bank was closed, or within a day or two. I didn't know anything about the details of it.

Q. And when you first became a member of that committee, you immediately found out, didn't you, that Bradbury had \$10000 to his credit in the bank?

A. No sir I did not. Oh, the bank up there?

Q. Yes, that is the first thing you would find out wasn't it?

A. Yes, I found out that he had that up there, yes.

Q. And how long after that was the reorganization effected? How long was that bank closed up?

A. Just exactly two months.

I won't say how long after the bank closed that this

check was given. I don't remember. I had the check, though, in my possession there, I presume I would consider it in my possession, quite a little while before the bank was opened up. I don't remember what the date was. I cannot remember now. I haven't noticed the check.

The notes were not turned over right away to Mr. Bradbury. I won't say now why they were not.

He bought them. One reason they wasn't turned over was this: The bank examiner forbid it at the present time that we opened up. He said to hold them notes awhile. The bank commissioner, probably it would be proper—Mr. Platt. He told me that. They were held till sometime this spring, I guess.

I do not know the exact date this suit was brought.

Defendant's COUNSEL: What is the date of the filing of the complaint?

Plaintiff's COUNSEL: Filed January 9, 1913.

I don't think the notes had been delivered up to Mr. Bradbury then. It is not a fact that they had not been delivered up to two weeks ago. They were delivered longer than two weeks ago, I think. I don't know who delivered them; I wasn't there, I guess the cashier did.

I am the president.

My attention was not called to the matter just at that time. I was away when they were turned over, and I won't say exactly what date it was.

The bank examiner did not tell me to turn them over; this bank examiner that I am speaking of now

is out of office long ago. Quite awhile ago, ever since last election.

After we reorganized the bank and issued new stock, and it was paid up in full, these notes were not carried on the books at all. They were just laying there in the vault. We weren't doing anything at all with them. The reason we didn't deliver them to Bradbury at the start was that the bank examiner told us not to. After that I wasn't asked for them any more. In fact, I didn't know for a long while where Mr. Bradbury was. Mr. Bradbury asked us for them when we did deliver them. He didn't come there, but he wrote. He wanted his notes. I won't say when he wrote that letter. I think there is such a letter at the bank. I don't say positively that I saw it myself, but I think the cashier told me there was such a letter same.

Redirect Examination.

I heard Mr. Eastwood's testimony to the effect that he, as receiver of the bank, canceled on the books of the bank these notes before the books were turned over to the reorganized bank.

Q. Do you know whether or not that is a fact, of your own knowledge?

A. Well, I know that the notes were never in our bank that we considered any value.

They were charged off. I saw Mr. Eastwood charge them off myself. About the time of giving this check, in reorganizing the bank.

In answer to several questions I have said "I won't

say," I mean I didn't remember and that I can't say.

(Excused.)

Plaintiff's counsel offered in evidence plaintiff's exhibits 5, 6, 7 & 8 respectively, consisting of certified copies of reports made by the Kendrick State Bank to the state bank commissioner of Idaho during the time of the existence of the obligation sued upon in this action, said offer being for the purpose of impeaching the testimony of Bradbury.

Defendant's counsel objected to said exhibits as incompetent and immaterial. Objection overruled and plaintiff duly excepted. Said exhibits are hereto attached and made a part hereof.

Plaintiff rested.

Thereupon the court took a recess until the following morning at ten A. M. Upon court convening on the following morning June 24, 1913, plaintiff's counsel requested permission to have the case opened to introduce in evidence the minute book of the Kendrick State Bank.

Defendant's counsel objected to opening the case for such purpose on the ground that such evidence was immaterial and also because the case had been closed.

The COURT: The Court is inclined to allow them to introduce the record.

To which ruling defendant excepted.

GLEN S. PORTER, sworn on behalf of the plaintiff, testified as follows:

I live in Kendrick, Idaho and am the cashier of the

Kendrick State Bank and have been since April 9, 1912. As such cashier I have the custody of the books and records of that bank. This book marked plaintiff's exhibit 9 is one of the records of the bank in my custody. It is the minute book of the bank containing the record of all meetings held by the directors and stockholders of the Kendrick State Bank from May 24, 1899 up until the date of the reorganization. At the time of the reorganization this book was turned over to me by Mr. Bradbury with all the rest of the papers as being one of the records of the bank prior to its reorganization.

Plaintiff's exhibit 9 offered in evidence by plaintiff's counsel.

Defendant's counsel objected to the same as incompetent and immaterial and because it was an extraordinary offer to offer a whole book.

The COURT: Why do you introduce the whole book without pointing out some matters that might interest the court?

Plaintiff's COUNSEL: For the purpose of showing that there was no action taken by the board of directors with reference to this loan. The only way that we could do that is to introduce the minutes of all their meetings covering this period. Now, if counsel wishes, we will limit our offer to that portion of the book covering the period from June, 1910, up to January, 1912. We are willing to do that; but the contents of this book are very short. I can ask this witness the question—this witness has read these rec-

ords over repeatedly, and knows what they contain. Now, the book is offered, not only for the purpose of showing that there was no action taken by the board of directors authorizing or ratifying this loan, but also for the purpose of showing that when the bank did borrow money from banks, the board of directors did pass resolutions to that effect, and directly authorized the loans to be made. And the Supreme Court has held that that is a vital element in the case. We overlooked this last night in closing. We intended all the way through to put this book in, and that part of it, I understand, is discretionary with the court, to permit that to be done after the case is closed, when no one has been harmed by it.

By the COURT: The objection is overruled. Defendant's counsel duly excepted to such ruling.

Plaintiff's COUNSEL: In conformity with the suggestion of the court we limit our offer to the contents of the book contained on pages 57 to 75 inclusive, which covers the period from June 1, 1910 to January 17, 1912, the period in question. We also offer the meeting of the board of directors contained on page 46 bearing date July 6, 1909, for the purpose of showing that the board of directors authorized a loan to be made from the Commercial National Bank of Chicago.

Said plaintiff's exhibit 9 was by written stipulation of the parties withdrawn from the record to be returned to the State Bank of Kendrick Idaho, and a copy of said exhibit was by stipulation filed in place

of the original, such copy is hereto annexed marked exhibit 9 and made a part hereof.

Plaintiff rested.

Case closed.

Thereupon the case was argued by counsel and thereafter the court made and filed findings in favor of the defendant and against the plaintiff, upon which judgment was entered.

Thereafter and within due time the plaintiff moved for a new trial upon the following grounds:

I.

That the decision and findings of the court were contrary to the law and evidence.

II.

That the court erred in admitting evidence offered on behalf of the defendant contrary to the objection of the plaintiff, and especially in admitting in evidence the note signed by J. W. Bradbury as being evidence of the indebtedness claimed by defendant to be due from the plaintiff.

III.

In excluding evidence offered by plaintiff and objected to by defendant, contrary to exceptions taken by plaintiff.

IV.

In holding that there was evidence to show that the plaintiff bank had received the benefit of the \$10,000 borrowed by Bradbury from defendant bank.

V.

In finding that the plaintiff was not entitled to re-

cover in this case, and that the defendant was entitled to recover the amount claimed in defendant's counterclaim.

Plaintiff's motion for a new trial was denied and plaintiff duly excepted to such ruling.

IT IS HEREBY STIPULATED that the foregoing contains a true and correct statement of all the proceedings had upon the trial of this action and that the same contains all the evidence, testimony and exhibits offered and received upon such trial, together with the objections, exceptions and rulings thereon, and that the foregoing may be settled and signed by the Judge of this Court as a true and correct Bill of Exceptions herein without further notice, and that the same shall be certified to contain all the evidence and proceedings had upon the trial.

STAPLETON & SLEIGHT & C. L. McDONALD,
Plaintiff's Attys.

DOLPH, MALLORY, SIMON & GEARIN,
Defendant's Attys.

I, Chas. E. Wolverton, judge before whom the above entitled action was tried, hereby certify that the foregoing is a true and correct Bill of Exceptions containing all the evidence, testimony, rulings and exceptions introduced or had upon the trial of this action and upon the foregoing stipulation the same is hereby settled as a true and correct Bill of Exceptions and certified to contain all the evidence, exhibits, testimony and proceedings had upon said trial.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: Bill of Exceptions. Filed Sep. 10, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 7th day of October, 1913, there was duly filed in said Court, a Petition for Writ of Error, in words and figures as follows, to wit:

[Petition for Writ of Error.]

*In the District Court of the United States for the
District of Oregon.*

KENDRICK STATE BANK, a corporation,
Plaintiff,

v.

FIRST NATIONAL BANK OF PORTLAND, a
corporation,

Defendant.

Now comes the above named plaintiff and says that on or about the 4th day of August, 1913, this court entered a judgment herein in favor of the defendant and against the plaintiff, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of the plaintiff, all of which will more fully appear upon the assignment of errors filed with this petition.

WHEREFORE the plaintiff prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of and

that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the clerk of said United States Circuit Court of Appeals.

STAPLETON & SLEIGHT,
& C. L. McDONALD,
Attorneys for Plaintiff.

[Endorsed]: Petition for Writ of Error. Filed
Oct. 7, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 7th day of October,
1913, there was duly filed in said Court, an As-
signments of Error, in words and figures as follows, to
wit:

[Assignments of Error.]

*In the District Court of the United States for the
District of Oregon.*

KENDRICK STATE BANK, a corporation,
Plaintiff,

vs.

FIRST NATIONAL BANK OF PORTLAND, a
corporation,
Defendant.

The plaintiff in the above entitled action, in connection with its petition for writ of error, makes the following assignment of errors which it avers occurred on the trial of said cause, to-wit:

I.

That the decision and findings of the court were contrary to the law and the evidence.

II.

That the court erred in admitting evidence offered on behalf of the defendant, contrary to the objection of the plaintiff, and especially in admitting in evidence the note signed by J. W. Bradbury as constituting evidence of the indebtedness claimed by defendant to be due to it from the plaintiff.

III.

That the court erred in excluding evidence offered by plaintiff and objected to by the defendant.

IV.

That the court erred in holding that there was evidence thereof that the plaintiff bank had received the benefit of the \$10,000 borrowed by Bradbury from the defendant bank.

V.

That the court erred in finding that the plaintiff was not entitled to recover in this case and that the defendant was entitled to recover the amount claimed in defendant's counterclaim.

STAPLETON & SLEIGHT &
C. L. McDONALD,

Plaintiff's Attys.

[Endorsed]: Assignment of Errors. Filed Oct. 7, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 8th day of October, 1913, there was duly filed in said Court, an Order Allowing Writ of Error, in words and figures as follows, to wit:

[Order Allowing Writ of Error.]

*In the District Court of the United States for the
District of Oregon.*

KENDRICK STATE BANK, a corporation,
Plaintiff,

v.

FIRST NATIONAL BANK OF PORTLAND, a
corporation,
Defendant.

Upon the 8th day of Oct. 1913 came the above named plaintiff, by its attorneys, C. L. McDonald and Stapleton & Sleight and filed herein an order presenting to this court its petition praying for the allowance of a writ of error. Also for an assignment of errors intended to be urged by the plaintiff, praying also that a transcript of the record of the proceedings and papers upon which the judgment herein was returned duly authenticated may be sent to the United States Court of Appeals for the Ninth Circuit and that such other and further proceedings may be had as are right and proper.

In consideration whereof, upon the plaintiff giving a bond according to law in the sum of \$2500., which

shall operate as a supersedeas bond, the court does allow the writ of error.

R. S. BEAN,
Judge.

[Endorsed]: Order allowing Writ of Error. Filed Oct. 8, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 9th day of October, 1913, there was duly filed in said Court, a Bond on Writ of Error, in words and figures as follows, to wit:

[Bond on Writ of Error.]

*In the District Court of the United States for the
District of Oregon.*

KENDRICK STATE BANK, a corporation,
Plaintiff,

v.

FIRST NATIONAL BANK OF PORTLAND, a
corporation.

Defendant.

KNOW ALL MEN BY THESE PRESENTS that we, Kendrick State Bank,, a corporation, plaintiff, of Idaho, as principal, and United States Fidelity & Guaranty Company, a corporation, of Baltimore, Maryland, as surety, are held and firmly bound unto the First National Bank of Portland, Oregon, in the full and just sum of \$2500 to be paid to the First National Bank of Portland, its successors or assigns, to

which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 6th day of Oct., 1913.

WHEREAS lately at the regular term of the District Court of the United States for the District of Oregon, in an action pending in said court between the Kendrick State Bank a corporation as plaintiff and the First National Bank of Portland, a corporation as defendant, a judgment was rendered against said plaintiff, and the defendant has obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the aforesaid action, and a citation directed to the said First National Bank of Portland, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, California, thirty days from and after the date of said citation.

NOW the condition of the above obligation is such that if the said Kendrick State Bank shall prosecute said writ of error to effect and answer all damages and costs if it fails to make good its plea, then the above obligation to be void; otherwise to remain in full force and virtue.

KENDRICK STATE BANK,

By G. S. Porter, Cashier.

(Bank Seal)

U. S. FIDELITY & GUARANTY CO.,

By J. C. Hartman,

Its Attorney in Fact.

(Seal)

In the presence of:

WALTER M. THOMAS.

CORA OSMUND.

The foregoing bond is approved both as to form and surety.

R. S. BEAN,

Judge.

[Endorsed]: Bond on Appeal. Filed Oct. 9th, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 9th day of October, 1913, there was duly filed in said Court, a Writ of Error, in words and figures as follows, to wit:

[Writ of Error.]

*In the United States Circuit Court of Appeals
for the Ninth District.*

KENDRICK STATE BANK, a corporation,

Plaintiff in Error,

vs.

FIRST NATIONAL BANK, a corporation,

Defendant in Error.

THE UNITED STATES OF AMERICA,—ss.

THE PRESIDENT OF THE UNITED STATES
OF AMERICA.

To the Judge of the District Court of the United States for the District of Oregon: Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable CHAS. E. WOLVERTON, one of you, between Kendrick State Bank, Plaintiff and Plaintiff in Error, and First National Bank of Portland, Defendant and Defendant in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appaer; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable EDWARD DOUGLAS WHITE,

Chief Justice of the Supreme Court of the

United States this 9th day of October, 1913.

A. M. CANNON,

Clerk of the District Court of the United
States for the District of Oregon.

[Endorsed]: Writ of Error. Filed Oct. 9, 1913.

A. M. CANNON,

Clerk.

And afterwards, to wit, on the 10th day of October, 1913, there was duly filed in said Court, a Citation on Writ of Error, in words and figures as follows, to wit:

[Citation on Writ of Error.]

UNITED STATES OF AMERICA,

District of Oregon.—ss.

To the First National Bank of Portland, a corporation, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Kendrick State Bank, a corporation, plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District,

this 9th day of October in the year of our Lord, one thousand, nine hundred and thirteen.

R. S. BEAN,
Judge.

[Endorsed]: Citation on Writ of Error. Filed October 10, 1913.

A. M. CANNON,
Clerk.

And afterwards, to wit, on Saturday, the 8th day of November, 1913, the same being the 6th Judicial day of the Regular November Term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Transcript.]

*In the District Court of the United States for the
District of Oregon.*

No. 5877

November 8, 1913.

KENDRICK STATE BANK,

Plaintiff,

v.

FIRST NATIONAL BANK,

Defendant.

Now, at this day, for good cause shown, it is Ordered that plaintiff's time for filing the record and docketing the above entitled cause on the appeal, in

the United States Circuit Court of Appeals for the Ninth Circuit, be and the same hereby is extended thirty days from the date hereof.

CHAS. E. WOLVERTON,
Judge.

And afterwards, to wit, on Monday, the 10 day of November, 1913, the same being the 7th Judicial day of the Regular November Term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Certifying Up Exhibits.]

*In the District Court of the United States for the
District of Oregon.*

No. 5877

November 10-1913.

KENDRICK STATE BANK, a Corporation,
Plaintiff,

vs.

FIRST NATIONAL BANK OF PORTLAND, a
corporation,
Defendant.

It appearing that certain exhibits introduced in evidence on the trial of this cause are of such nature as to require inspection by the appellate court on the appeal herein;

It is ordered that plaintiff's exhibits 5, 6, 7, and 8 be

certified up by the clerk with the record on appeal to the United States Circuit Court of Appeals, Ninth Circuit.

CHAS. E. WOLVERTON.

IN THE

**United States Circuit Court
of Appeals**

NINTH CIRCUIT

KENDRICK STATE BANK, a Corporation,		Plaintiff in Error.
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vs.

FIRST NATIONAL BANK OF PORT- LAND, a Corporation,		Defendant in Error.
------------------------------------------------------	--	---------------------

BRIEF OF PLAINTIFF IN ERROR

STATEMENT.

This action was brought by the plaintiff to recover a balance of \$8283.09 claimed to be money of the plaintiff on deposit with the defendant which defendant refused to repay upon demand.

The undisputed evidence shows that on June 11, 1910, the plaintiff sent a letter to defendant stating that plaintiff's cashier had arranged with defendant for a loan of \$5000.00 to be made by defendant

to plaintiff to be evidenced by plaintiff's certificate of deposit and to be secured by collateral notes, which notes were enclosed in such letter.

On June 13, 1910, the defendant addressed a letter to the plaintiff stating that it had credited plaintiff's account for \$5000.00 upon such certificate of deposit and was returning the collateral notes to be endorsed by the plaintiff.

On June 16, 1910, the plaintiff, in a letter signed by Bradbury as president, returned the collateral notes to the defendant bank duly endorsed.

On September 6, 1910, the plaintiff in a letter signed by its cashier requested an extension of time on such loan, which was given.

On December 6, 1910, J. W. Bradbury, president of plaintiff, wrote to the cashier of the defendant bank requesting that the loan of \$5000.00 evidenced by the certificate of deposit be changed in form and that the defendant bank accept the personal note of J. W. Bradbury in place of the certificate of deposit, and stated that the reason for the request was that the Kendrick Bank did not desire to publish a report that it was borrowing from the First National Bank of Portland.

On December 7, 1910, the cashier of defendant bank wrote the plaintiff that it would accept the

note of J. W. Bradbury in place of the certificate of deposit and would accept his stock in the Kendrick bank as collateral thereto.

On December 13, 1910, J. W. Bradbury forwarded forty shares of stock in the Kendrick State Bank to the defendant bank as collateral security for his said note.

On June 6, 1911, J. W. Bradbury individually wrote the defendant bank requesting an extension of time for the payment of his note, and on June 7, 1911, in a letter addressed to him personally, the cashier of defendant bank agreed to such request, and on June 10, 1911, Bradbury individually forwarded his renewal note for \$5000.00 to the defendant bank.

On September 22, 1911, Bradbury individually requested a further extension of time of said note, which was granted by letter of September 25, 1911, written by defendant's cashier to J. W. Bradbury individually.

The undisputed testimony shows that in December, 1911, Mr. Bradbury came to Portland and verbally arranged with Mr. Newkirk, the cashier of defendant, for an increase of such loan from \$5000.00 to \$10,000.00 to be evidenced by the individual note of Bradbury and secured by fifty addi-

tional shares of Bradbury's stock in the Kendrick State Bank.

On December 16, 1911, in pursuance of such arrangement, J. W. Bradbury individually wrote the cashier of defendant bank enclosing an additional certificate of stock of fifty shares in the Kendrick State Bank.

On December 18, 1911, defendant bank returned this certificate to Bradbury individually for his endorsement and on December 21, 1911, Bradbury individually wrote defendant returning such certificate duly endorsed.

Until the change in the form of such loan, all the letters on behalf of the plaintiff were signed by Bradbury as president (record, pages 43-49). After the change in form of the loan by the substitution of Bradbury's individual note in place of the certificate of deposit, all letters written by Bradbury were signed by him individually and not as president, and all letters addressed to him by defendant bank were addressed to him personally and not as president (record, pages 49-55).

The original loan of \$5000.00 was evidenced by plaintiff's certificate of deposit secured by five notes aggregating \$10,230.00 payable by individuals to the Kendrick State Bank and endorsed by that bank to the defendant bank. (Record, pages 43-45).

At the time of the change of the form of this loan, and upon the acceptance by defendant of the individual note of Bradbury in place of the certificates of deposit and of Bradbury's stock in the Kendrick State Bank in place of the collateral notes of the five individuals above mentioned, the certificate of deposit and the individual collateral notes were returned to the plaintiff bank and thereafter the defendant bank retained only the individual note of Bradbury and his stock in the Kendrick bank as collateral thereto. (Record, pages 66, 95.)

Mr. Newkirk, the defendant's cashier, admits that there was nothing whatever upon the books of defendant bank to show that the plaintiff bank was indebted to defendant bank in any sum whatever, after the change in the form of this loan was made, and he admits that the only basis for any claim that plaintiff bank was indebted to defendant bank consisted of an oral understanding between himself and Mr. Bradbury at the time the latter came to Portland in December, 1911, and arranged for the increase of the loan to himself from \$5000.00 to \$10,000.00. (Record, page 66.)

The \$10,000.00 obtained by Bradbury from defendant bank was deposited by him in the Kendrick State Bank to his own personal credit. (Record, page 96.)

Thereafter the Kendrick bank failed and was

taken possession of by the Idaho Bank Commissioner under the laws of Idaho. In a few months it was reorganized by new capitalists and has since been doing business in the ordinary course. The \$10,000.00 was paid by Bradbury, by his personal check, to the Idaho Bank Commissioner to cancel an indebtedness of more than that amount which was due from his father and relatives and friends to the Kendrick bank upon notes given by them substantially in payment of subscriptions for stock in the bank, and in this way the \$10,000.00 was applied by Bradbury to his own personal use. (Record, pages 89-84; 100, 106, 108-114.)

The change in the form of the loan from a loan to the Kendrick bank into a personal loan to Bradbury was made with the intention of deceiving the depositors of the Kendrick bank (record, page 96); and defendant's cashier, who made the loan and consented to the change, testifies that the defendant bank knew of such purpose and intended to aid Bradbury in carrying it out. (Record, page 60.)

ASSIGNMENTS OF ERRORS.

I.

That the decision and findings of the court were contrary to the law and the evidence.

II.

That the court erred in admitting evidence offered on behalf of the defendant, contrary to the objection of the plaintiff, and especially in admitting in evidence the note signed by J. W. Bradbury as constituting evidence of the indebtedness claimed by defendant to be due to it from the plaintiff.

III.

That the court erred in excluding evidence offered by plaintiff and objected to by the defendant.

IV.

That the court erred in holding that there was evidence that the plaintiff bank had received the benefit of the \$10,000.00 borrowed by Bradbury from the defendant bank.

V.

That the court erred in finding that the plaintiff was not entitled to recover in this case and that the defendant was entitled to recover the amount claimed in defendant's counterclaim.

ARGUMENT.**I.**

In this case the indebtedness of defendant to plaintiff in the sum of \$8283.09 for the amount appearing upon defendant's books to the credit of plaintiff is conceded by defendant, unless the defendant is able to establish its offset or counterclaim, consisting of the alleged indebtedness by the plaintiff to the defendant for the loan evidenced by Bradbury's note. The question therefore arises whether under the law the defendant can be permitted to sustain an action against the plaintiff bank upon the individual note of Bradbury.

When a negotiable promissory note is made by an agent in his own name and does not disclose upon its face the name of the principal, no action lies against the principal.

Cragin vs. Lovell, 109 U. S. 194.

If an agent at the time of the making of a contract discloses the name of his principal, and the contract is then made with the agent alone, the person making the contract cannot maintain an action upon it against the principal.

Silver vs. Jordan, 136 Mass. 319.

When a party knows the principal but chooses to take the contract of the agent, he is bound by his election and cannot hold the principal.

Landers vs. Foster, Wash. 76; Pac. 274.

Shuey vs. Adair, 63 Amer.; S. R. 879.

A maker of a note with nothing on its face to disclose that he is an agent cannot introduce parol evidence to exonerate himself by showing that he only acted as agent under an agreement that the principal should be bound.

Shuey vs. Adair, 63 Amer.; S. R. 879.

When one obtains money from a bank and gives his individual note, and pledges as collateral security for the payment of said note stock owned by him in a corporation, the debt represented by the note is his individual debt and cannot be enforced against the corporation of which he is the president, and this rule is not affected by recitals in the petition that the money so obtained was for the use of the corporation and was so understood at the time and that the money was placed to the credit of the corporation on the books of the bank.

Andrews Co. vs. Nat. Bank of Columbus,
Georgia 58 S. E. Reporter 633.

Under the foregoing authorities, it is plain that the parol evidence introduced in this action whereby the defendant sought to show that while it accepted the individual note of Bradbury the indebtedness represented by such note was nevertheless the indebtedness of the plaintiff and not of Bradbury was inadmissible, and should not be considered in arriving at a conclusion in the case. In other words, even though that was the understanding between Bradbury and defendant's cashier, it constitutes no reason for enforcement of the debt against plaintiff when the defendant voluntarily accepted Bradbury's individual note for the debt. The acceptance of such note constituted an election on the part of the defendant to make Bradbury its debtor in place of plaintiff, and the defendant is bound by such election. This appears plain when it is remembered that the answer of defendant expressly bases its right of recovery upon such note, for it is alleged in the answer as follows: "And to evidence said loan plaintiff delivered to defendant the promissory note of J. W. Bradbury, the then president of the plaintiff," and on the same page the defendant further alleges in its answer in reference to the increase from \$5000.00 to \$10,000.00 as follows: "To evidence which loan the plaintiff delivered the note of J. W. Bradbury then president of the defendant and its agent and representative." (Record, page 5.)

These allegations, taken in connection with the

undisputed testimony above referred to, conclusively establish the fact that defendant accepted the individual note of Bradbury as the agent of the plaintiff with knowledge of the fact that he was acting as such agent. This being the case the rules above mentioned apply, and the defendant is estopped from asserting its claim against plaintiff, it having accepted the individual note of the agent.

II.

The plaintiff also contends that there can be no recovery by defendant in this case in any event, for the reason that if the loan was made to the plaintiff bank and not to Bradbury individually it was not made by authority or with the knowledge of the board of directors of the plaintiff, nor was it ever ratified or confirmed by them, and it has not been shown by the defendant that the plaintiff received the benefit or proceeds of the loan. Under these circumstances the case is ruled by the following decision:

Western National Bank vs. Armstrong, 152
U. S. 349.

The last mentioned decision should be compared with the following case:

Aldrich vs. Chemical Nat. Bank, 176 U. S.
618.

In the former case no authority for making the loan existed and the bank did not receive the proceeds, and it was held that recovery could not be had from it. In the latter case no authority for making the loan existed but it was shown that the bank received the proceeds and it was held that it was estopped from denying the right of recovery under these circumstances.

In the present action the undisputed evidence plainly shows that the Kendrick State Bank never got the benefit of the \$10,000.00 in question because the money was deposited by Bradbury to his individual account in the Kendrick bank and was used by him in paying the individual notes of himself and his father and others, which notes it plainly appears were given in payment of subscriptions to stock in the Kendrick bank. Whether the notes were given for stock subscriptions or not, it conclusively appears that they were liabilities on the part of Bradbury and his relatives and that he was extremely anxious to wipe out such liabilities and that he used this money to extinguish those claims. (Record, pages 89-94, 100, 106, 108, 114.)

It is contended by the defendant that Bradbury informed the committee who were reorganizing plaintiff bank, before he paid the \$10,000.00 to take up these notes, that this money belonged to the Portland bank. This testimony, however, is ex-

pressly denied by the chairman of the committee and is contradicted by Eastwood, the Bank Commissioner; but even if Bradbury did make such statement it could not change the result but it would merely show that he was more amenable to the interests of himself and his father than to those of the Portland bank, and that when they came in conflict he sacrificed the latter to the former. His conduct in this respect could not in any way affect or waive the rights of plaintiff bank.

Upon the whole case it is therefore respectfully submitted that the plaintiff should have judgment for the amount claimed.

STAPLETON & SLEIGHT and

C. L. McDONALD,

Attorneys for Plaintiff in Error.

No. 2347.

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Kendrick State Bank, a corporation,

Appellant,

vs.

First National Bank of Portland, a corporation,

Appellee.

Writ of Error to the District Court of the
United States, for the District of Oregon.

RESPONDENT'S BRIEF.

STATEMENT OF CASE.

The record discloses that for a number of years prior to February 8, 1912, the Kendrick State Bank, of Kendrick, Idaho, was a correspondent of the First National Bank of Portland, using the latter as a reserve agent and from time to time receiving such accommodation from it as the former Bank required.

On June 10, 1910, the Portland Bank loaned the Kendrick Bank \$5,000.00, to evidence which the Kendrick Bank issued its C-D to the Portland Bank. The money so loaned was deposited with the Portland Bank to the credit of the Kendrick Bank, subject to its checks or drafts, and the balance remaining undrawn at the maturity of the loan to be applied in payments thereof. This loan at the request of the Kendrick State Bank was renewed from time to time, and on December 11, 1911, was increased to \$10,000.00.

About six months after the loan was originally made and also at the time the loan was increased to \$10,000.00, the Kendrick Bank through its President, and for reasons appearing in the letter of J. W. Bradbury, President of the Kendrick Bank, to J. W. Newkirk, Cashier of the Portland Bank, dated December 6th, 1910, which appears on page — of this Brief, requested the Portland Bank to evidence the loan or loans made to the Kendrick Bank by taking the note of J. W. Bradbury, its President, in place of the Bank's C-D. This the Portland Bank agreed to do, and because at the time of the commencement of this action it held no direct written obligation of the Kendrick Bank, it is now contended that there was a novation and that the Kendrick Bank was released from liability on account of the money loaned by the Portland Bank to the Kendrick Bank.

On February 8, 1912, the Kendrick Bank became

insolvent and passed into the control of the State Bank Commission of Idaho. Upon learning this the Portland Bank applied \$8,283.39 then on deposit with it to the credit of the Kendrick Bank (being the balance of money loaned by the Portland Bank) on account of the aforesaid loan.

Thereafter steps were taken to reorganize the Kendrick Bank and the parties in charge of such reorganization seek to recover from the Portland Bank the said sum of \$8,203.09 on deposit at the date of the insolvency of the Kendrick Bank, claiming that the debt was Bradbury's and not that of the Kendrick Bank.

The Portland Bank insists that in addition to the right to apply the balance on deposit to the debt of the Kendrick Bank it is also entitled to have judgment against the Kendrick Bank for the balance of the debt, with interest.

The entire transaction is still between the original parties. The two persons negotiating the loan and making the contract were J. W. Bradbury, President of the Kendrick Bank, and J. W. Newkirk, Cashier of the Portland Bank. We quote from their testimony so much as we deem material to a proper understanding of the arrangement entered into by the two Banks:

EVIDENCE.

J. W. Newkirk, Cashier of the Portland Bank:

I know Mr. Bradbury, President of the Kendrick State Bank. The Portland Bank for several years had been correspondent of the Kendrick Bank. I remember the circumstances of the first loan of \$5,000.00 made by Defendant to Plaintiff in June, 1910. (Identifies letter of J. W. Bradbury, President, dated June 11, 1910, requesting loan, and reply thereto.) Trans. of Rec., pp. 42, 43, 44.

This loan was extended from time to time. Under date of December 6, 1910, the Portland Bank received from the Kendrick Bank the two following letters:

Kendrick State Bank,

Kendrick, Idaho, Dec. 6, 1910.

J. W. Newkirk, Cashier,

First National Bank, Portland, Oregon.

Dear Sir: In reference to our C-D due Dec. 12th for \$5,000.00. Would it be possible for us to get an extension on this for six months? The collections with (us) are at a standstill and from the outlook I am of the opinion they will continue so until another crop is harvested.

We enclose our C-D for \$5,000.00 for the time asked for in case you can grant us the extension asked to replace the one you hold.

We are writing you on another sheet for this

to be carried in another way with our reasons for asking for the change.

Hoping you will grant us the favor of an extension and thanking you for your many kindnesses of the past, I am, very truly yours,

J. W. BRADBURY, President.

Kendrick State Bank,

Kendrick, Idaho, Dec. 6, 1910.

J. W. Newkirk, Cashier,

First National Bank, Portland, Oregon.

Dear Sir: I am sending herewith my personal note for \$5,000.00 with Kendrick Bank Stock for like amount attached for your consideration.

We would like to have you in case you can grant us the extension asked in letter regarding our C-D for \$5,000.00 due Dec. 12, 1910, to have you take this note and pass to our credit in place of the C-D.

The reason for this is, in our statements to the State Bank Commissioner which are published we now have to publish any Certificates of Deposit to other banks for borrowed money as such and in a farming community this always causes unfavorable comment and naturally hurts.

I feel sure our average Daily Balance as we have kept it for the past few months will be

kept as strong and we want this extension more to keep our reserve in as good shape as possible.

Hoping if you can carry us for the extension you will accept this method of loaning us this amount, and again thanking you for your great kindness of the past, I am,

Yours truly,

J. W. BRADBURY, President.

To these two letters Mr. Newkirk replied as follows:

December 7, 1910.

Kendrick State Bank,
Kendrick, Idaho.

Gentlemen: Answering yours of the 6th inst., we will be pleased to make the extension referred to by you, and will accept the note in lieu of the certificates of deposit. We enclose herein for endorsement two certificates aggregating thirty shares of stock which you may return to us after procuring the required endorsement.

Yours very truly,

J. W. NEWKIRK, Cashier.

The witness Newkirk further testified:

I remember an interview between myself and Mr. J. W. Bradbury, president of the Kendrick State Bank, during the early part of December, 1911, when this loan was increased from \$5,000

to \$10,000. It took place at the First National Bank and Mr. Bradbury and myself were present. * * * Oh, well, we simply agreed to take \$5,000 more in addition to what we had. We agreed to increase the loan to the Kendrick State Bank. *We absolutely were not loaning any money to Mr. Bradbury individually.* I do not know anything about Mr. Bradbury's personal responsibility and never did, as our dealings were entirely with the Kendrick State Bank. In December, 1911, the First National Bank loaned the Kendrick State Bank \$5,000 more. We took a note for \$10,000, and placed the money to the credit of the Kendrick State Bank. The First National Bank had from time to time collateral security as indicated by this correspondence in addition to the certificate of deposit and the note of Mr. Bradbury. * * * The collateral has all been returned. (Trans., pp. 55-56.)

There never was any agreement between ourselves and any of the parties, either the Kendrick State Bank or Mr. Bradbury, that the First National Bank would release or did release the Kendrick State Bank from obligation on account of the moneys advanced by the First National Bank. We never agreed to take Bradbury individually for the money that the Kendrick State Bank got from the First National. (Trans., p. 57.)

I knew nothing about Mr. Bradbury's affairs, whether or not he was supposed to be perfectly solvent at that time. I didn't consider him at all. I accepted that note (Bradbury's) for the Kendrick State Bank. It is customary for banks to take the individual note of the president for a loan to the bank. It is done quite frequently. Our bank has done it frequently. (Trans., p. 61.)

Plaintiff's counsel called my attention to the time the loan was increased from \$5,000 to \$10,000 and asked about Mr. Bradbury requesting the increase. Mr. Bradbury came to us from and represented himself as acting for the Kendrick State Bank. Our transaction was with him as president and for account of the Kendrick State Bank. (Trans., pp. 67-68.)

J. W. Bradbury testified on behalf of the defendant:

I took over the Kendrick State Bank in December, 1904, and was elected president and remained president up to the time of its suspension.

The First National Bank of Portland had been our correspondent, and on June 11, 1910, I simply wrote to the First National Bank of Portland, telling them that I needed to make a loan of \$5,000. * * * The money was deposited down here to the credit of the Kendrick

State Bank and checked against by the Kendrick State Bank and the Kendrick State Bank also deposited at times and kept an open balance there. When that loan was matured, it was continued. * * * You read that portion of the letter to me, which has been introduced in evidence: "We are writing you on another sheet for this to be carried in another way with our reasons for asking for the change." I recall writing that. * * * I think the body of that letter covers it. I simply wrote and told them my reasons for changing the form of loan, and asked them might I have that kind of accommodation. And they agreed to it. *It was never, at that time or any time, agreed between the First National Bank and myself that the account against the Kendrick State Bank should be released. There never was any such agreement as that.*

Q. These transactions that I have called your attention to took place in 1910. Now in December, 1911, this account was increased from \$5,000 to \$10,000. Do you remember that occurrence?

A. Yes, sir; I needed an extra accommodation of \$5,000 and I made a trip down here especially to see Mr. Mills or Mr. Newkirk, of the First National Bank. I told them the situation I was in; I wanted to borrow the money and

make the loan for \$10,000, make an increase of \$5,000 over the original loan. When I say "I," I mean myself as president of the Kendrick State Bank. I made the trip and I made the arrangements with the First National Bank to borrow the money. That increased sum, the extra \$5,000, was borrowed for the bank. At the time I made that arrangement with Mr. Newkirk or Mr. Mills, or whoever represented the First National Bank, it was not agreed between us that the account against the Kendrick bank should be released at all. (Trans., pp. 84-5.)

At that time I gave a note to the First National Bank and the money was deposited in the First National Bank to the credit of the Kendrick State Bank and was utilized by the bank in checking against it. As president of the bank, I knew it was there. * * *

I did not have any arrangement with the First National Bank individually. Not at all at any time. (Trans., p. 86.)

The Kendrick State Bank paid the interest on these notes from time to time as it fell due.
* * *

Q. There has been some testimony introduced here with reference to certain stock of the Kendrick State Bank owned by you, and depos-

ited by you with the First National Bank. Tell the court what became of that stock.

A. The First National Bank of Portland returned it to me, and I turned it over to Mr. Martin V. Thomas, now president of the Kendrick State Bank. He is now president of the Kendrick State Bank. * * *

At the time the Kendrick State Bank closed there was a credit due me of something over \$10,000, ten thousand one hundred and something, I believe, if I remember rightly. When it closed and these people were in process of settling it up and reorganizing it, and negotiations were going on between us, I told those people whose money that was. * * * I told them that the money did not belong to me, that it was the First National Bank of Portland's money. I told them on two different times that I know of, one time when the committee waited on me at my home, and another time when I was up in the Kendrick State Bank's office. (Trans., pp. 87-8.)

As a part of that conversation and the transaction that occurred there I signed a check in favor of Mr. Thomas for the \$10,000, checking out to them all the money that was in the bank in my name. This check was signed in the Kendrick State Bank office, at the second in-

terview. At the time I signed the check I had told them twice whose money it was.

I didn't get anything for that check that I signed to them. I didn't turn over the stock at that time. They had part of the stock in the bank. This Portland stock was some time later getting up there. I turned it over later on. There was nothing else turned over to them. I didn't have anything else. So then the situation was that they took all I had, bank stock and everything, and the money that stood to my credit in the bank.

Q. And now the claim is that this is your debt to the First National Bank, is that it?

A. I don't know what they think about it.
(Trans., pp. 84 to 89.)

At that time this committee wanted me to turn over this \$10,000 to them and I objected, and told them the money was not mine. I was acting under the advice of my attorney from Moscow, Mr. Morgan, and he advised me to give them the check for it, for he said, "It don't make any difference, anyhow. They will grab this money. It don't make any difference. If they can't get it on this stock transaction or your check, they will simply assess it out of you on the stock, so you might as well give them the check and let it go at that, and make the endorsement on the check." (Trans., p. 93.)

At the time I gave my first note the facts leading up to that transaction are substantially as they are set forth in the communication from me to the First National Bank, that is in evidence here, and that was referred to by counsel in his examination of me. In fact, I had no personal communication with them at that time. It is all contained in that letter. * * *

I considered this note of mine an obligation of the Kendrick State Bank, and I always considered that that was a liability of the Kendrick bank. (Trans., pp. 94-95.)

Referring to the loans made by the First National Bank of Portland to the Kendrick State Bank, the witness Bradbury further testified: "*I instructed them to at any time charge the account of the Kendrick State Bank with them with the note.*" (Trans., p. 97.)

I owned \$23,000 of stock in that bank (Kendrick Bank). I practically owned it all, except some organization shares. The capital stock was \$25,000. The other was owned by relatives of mine, so that I was practically the bank.
* * *

One of the accounts that was carried by the bank at that time was an account called "Bad Debts" that amounted to something over \$26,000. I carried that along as long as I could and absorbed what little profits I made until the

state appointed a state bank examiner. Then I had to charge those off, those accounts, together with other bad debts; and in order to make that up I gave my notes and my people's notes to the amount of \$25,000 to do that; and these are the notes that have been carried along. * * *

Referring to the money loaned by the Portland bank, witness stated:

I supposed that Mr. Newkirk knew that this money was credited to my account up there in the Kendrick bank, just from the natural procedure of business.

POINTS AND AUTHORITIES.

A loan of money to a corporation will render it liable for the debt, although the note of individuals, instead of the note of the corporation, was taken therefor, because it was supposed to be better security. *The test is whether the note was received as a consideration for the money or only as a security.*

Third National Bank v. Van Haagen Mfg. Co., 12 L. R. A. 223; (s. c., 141 Pa. St. 214, 21 Atl. 598).

Merchants Bank v. Central Bank, 44 Am. Dec. 665.

While deposits are ordinarily transferable by check or draft, they may be transferred by parol.

3 Am. & Eng. Encyl. Law (2 ed.), p. 830.

McEwan v. Davis, 39 Ind. 109.

Neff v. Green Co. Bank, 89 Mo. 581.

Armour v. First Natl., 11 South. 28.

A bank deposit is subject to any arrangement which the depositor and the bank may make concerning it. It is therefore clear that the direction of Bradbury to apply the money on deposit with the Portland bank to the payment of the loan fully justified the Portland bank in making the application.

Harrison v. Harrison, 118 Ind. 179; (4 L. R. A. 111).

The right of the bank to apply deposits to the extinguishment of the depositor's indebtedness as it matures grows out of the doctrine that the relationship between bank and depositor is that of debtor and creditor. The bank holds a lien upon the deposits in its hands to secure the repayment of the depositors' indebtedness, and may enforce that lien as the debts mature by applying the debtor's deposits upon them, thus setting the two off against each other.

3 Am. & Eng. Ency. of Law (2 ed.), 835.

2 Morse on Banks and Banking, Sec. 559.

Park Bank v. Schneidermeyer, 62 Mo. App. 179.

In an action against a bank to recover the amount of a general deposit the bank may show that it held notes of the depositor for an amount which equaled his deposit, and that the deposit had been applied to the payment of the notes under pleas to the effect that it was never indebted to the plaintiff as alleged, and that it did not have in its possession the sum sued for or any sum deposited with it by the depositor; and to make such defense it is not necessary for it to file a plea of set-off.

Durkee v. National Bank of Florida, 102 Fed. 845.

Bank v. Brewing Co., 50 Ohio St. 151.

A bank has the right to apply to the payment of a depositor's note not only all funds in the bank when the note matures, but all funds afterwards received, as well as proceeds of commercial paper owned by him and left with the bank for collection.

Muench v. Valley Bank, 11 Mo. App. 144.

First Nat. Bank v. City Natl. Bank, 102 Mo.

App. 357; (76 S. W. 489).

When a depositor opens an account in a bank that very act, in the absence of an agreement to the contrary, authorizes an appropriation of his deposit balance to any matured claims the bank may hold against the same as if he had then executed an agreement in writing to that effect.

60 N. Y. Supp. 722.

Myers v. N. Y. Co. Bank, 55 N. Y. Supp. 504, 5.

Morse on Banks and Banking, Secs. 324, 328, 337.

42 N. W. 434.

A valid novation cannot be accomplished without an agreement of the parties to extinguish the old debt and substitute for it a new debt against another party, which is not accomplished by the mere assumption of the existing debt by a third party.

Miles v. Bowers, 49 Or. 429.

One of the essential elements to a novation is that there should have been an extinguishment of the old debt, and another is that there should have been a mutual agreement between all of the parties that the old debt should become the obligation of a new debtor.

Kelso v. Fleming, (3 N. E. 830) ; 104 Ind. 180.

Miles v. Bowers, 49 Or. 452.

There must be a release from the prior obligation.

Miles v. Bowers, 49 Or. 433.

Kelso v. Fleming, 3 N. E. 830.

Chenoweth v. National Building, etc., 53 S. E. 559, 561.

Hill v. Warner, 50 N. E. 582.

It has been said that in every novation there are four essential requisites:

1. A previous valid obligation.
2. The agreement of all the parties to the new contract.
3. The extinguishment of the old contract.
4. The validity of the new one.

Hayward v. Burke, 37 N. E. 847.

A novation is never presumed, but must be established by the full discharge of the original debt by the express terms of the agreement or the acts of the parties, whose intention must be clear.

Chenoweth v. National Building, etc., 59 W. Va. 653; (53 S. E. 561).

Bradbury's acts as president were binding on the Kendrick bank, and no formal vote or authorization of the board of directors was necessary.

Columbia Nav. Co. v. Vancouver, 32 Or. 532.

Wehrung v. Portland, etc., 61 Or. 52.

Aldrich v. Chemical Bank, 176 U. S. 618.

When the Portland bank increased the loan to \$10,000, crediting the Kendrick bank with the money, under an agreement that the Portland bank might, when it elected to do so, apply any deposit the Kendrick bank had, in repayment of the debt, the deposit could be so applied, *no matter whose debt it was*. The Kendrick bank could not adopt part of the transaction (taking the money) without adopting all of it.

Ladd & Tilton Bank v. Commercial, etc., 130 Pac. 975.

Roe v. Bank of Versailles, 67 S. W. 303; see page 308 (M).

ARGUMENT.

It seems scarcely necessary to further discuss this case. The statement of the controversy, with the testimony we have quoted and the points and

authorities cited, must be convincing that the appellant has no standing in a court of law to enforce the claim it is urging, and that the judgment of the district court is the only one that could have been rendered in this action.

Not only the oral evidence, but the correspondence between the two banks, is undisputed, to the effect that the loan was made to the Kendrick State Bank and not to Bradbury individually. That the debt to the Portland bank was that of the Kendrick bank is also strongly evidenced by the fact that Bradbury had a credit on the books of the Kendrick bank to the extent of the full amount of the loan, or practically so, during the entire time that the loan existed, and when his bank failed, there was fully ten thousand dollars to the credit of Bradbury, which sum the depositors' committee compelled him to turn over to them in lieu of a lot of notes issued to take the place of an account carried as "Bad Debts," for which no consideration had been received and which could not have been collected and which notes did not even purport to be due for nearly four years.

Then again the testimony of Bradbury further discloses that when he came to Portland in December, 1911, to secure for his bank an additional five thousand dollars, and when he gave his note to evidence the ten-thousand-dollar debt due the Portland bank, he, on behalf of the Kendrick bank and as its president, authorized the Portland bank to apply at

any time it saw fit the moneys the Kendrick bank might have on deposit with the Portland bank in payment of his note to the Portland bank.

Therefore if the debt in question was Bradbury's debt and not the Kendrick State Banks' debt, the Portland bank had authority to and was justified in applying the Kendrick bank's balance in payment of the acts to the extent the deposit would do so. It must also be borne in mind that to enable the Kendrick bank to reopen the Portland bank surrendered one hundred shares of that bank's stock which was valuable and would have paid the debt due the Portland bank. It is too plain to require argument that this stock must be returned to the Portland bank before the Kendrick bank can be heard to make its present contentions.

We submit that if it should now be held that the loan under consideration was the personal loan of Bradbury and not a loan to the Kendrick bank, then such loan was made not by agreement of the parties, but in spite of their agreement and by virtue of a contract made for them by the court.

It is unnecessary to consider the authorities cited by plaintiff in error to the effect that there can be no recovery against an undisclosed principal on a note signed by an agent in his own name. Respondent is not making such contention nor suing on any note, but is seeking to recover on the contract of

the parties of which the note is a mere incident.
(12 L. R. A. 223.)

We respectfully insist that the judgment of the
District Court was right and should be affirmed.

DOLPH, MALLORY, SIMON & GEARIN,
Attorneys for Appellee.

No. 2349

United States
Circuit Court of Appeals

For the Ninth Circuit.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation, and JOSEPH W. GOULD,
Plaintiffs in Error,
vs.

EFFIE J. GOULD DUNLEVY,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Northern District of California,
Second Division.

FILED
FEB 14 1914

United States
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NEW YORK LIFE INSURANCE COMPANY, a
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

Messrs. McCUTCHEN, OLNEY & WILLARD, Attorneys for Defendant and Plaintiff in Error,
Merchants' Exchange Building, San Francisco, Cal.

FRANK W. TAFT, CLARENCE COONAN & NAT SCHMULOWITZ, Esqrs., Attorneys for Plaintiff and Defendant in Error,
Merchants' National Bank Building, San Francisco, Cal.

*In the Superior Court of the State of California, in
and for the County of Marin.*

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation, and JOSEPH A. GOULD,
Defendants.

Complaint.

Plaintiff for cause of action alleges:

1. That the defendant, the New York Life Insurance Company, is a corporation, organized and existing under and by virtue of the laws of the State of New York and doing business in the State of California, and has filed in the office of the Secretary of State of the State of California the designation of the person upon whom service of summons may be had; that such person is J. H. Gray, located at the

Forwarded from ——— Branch Office, ———,
19—.

—————, Cashier.”

— and delivered the same to the New York Life Insurance Company, and on the 30th day of June, 1893, the said New York Life Insurance Company made and executed a certain instrument in writing in words and figures following:

“State of Pennsylvania,
County of Allegheny,—ss.

On this 27th day of June, 1893, before me, personally came Joseph W. Gould, to me known to be the individual described in and who executed the foregoing assignment, and acknowledged that he executed the same.

(Signed) HENRY C. RYAN,
Notary Public.

THE NEW YORK LIFE INSURANCE COMPANY, in accordance with its rules, as stated below, has retained the duplicate of this assignment.

(Signed) JOHN A. McCALL,
Pres.,
Per E. LAWES.”

5. That Effie J. Gould named in the foregoing instrument is the plaintiff herein.

6. That the said sum of \$2,479.70 has never been paid and the same is now due and payable from the defendant the New York Life Insurance Company to the plaintiff herein.

7. That the said original policy, #305,011, is now in the possession of the defendant Joseph W. Gould and the duplicate of the instruments set forth in

paragraph 4 hereof are now in the possession of the defendant Joseph W. Gould, and he claims a right to the proceeds of said policy, viz., the said sum of \$2,479.70, but such claim is without any right whatsoever.

8. That both defendants are now residents of the [3] State of California and plaintiff hereby designates the County of Marin as the proper place of trial of this action.

WHEREFORE plaintiff prays judgment against the defendant, the New York Life Insurance Company, for the sum of \$2,479.70, with interest thereon at the rate of 7% per annum from the 22d day of January, A. D. 1909, to the date of judgment, and for costs of suit and for judgment against the defendant, Joseph W. Gould, to the effect that he be barred from participating in the said sum of \$2,479.70 or any part or portion thereof, and for costs of suit.

FRANK W. TAFT,
Attorney for Plaintiff,

State of California,
City and County of San Francisco.— ss.

Effie J. Gould Dunlevy, being first duly sworn, deposes and says that she is the plaintiff in the foregoing complaint; that she has read the foregoing complaint and knows the contents thereof; that the same is true of her own knowledge, except as to those matters therein stated on her information and belief and as to those matters that she believes it to be true.

EFFIE J. GOULD DUNLEVY.

Subscribed and sworn to before me this 12th day of January, 1910.

OLIVER DIBBLE,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jan. 14, 1910. Rob. E. Graham, Clerk. By F. S. Holland, Deputy. [4]

*In the Superior Court of the State of California, in
and for the County of Marin.*

EFFIE J. GOULD DUNLEVY,
Plaintiff,
vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation, and JOSEPH W. GOULD,
Defendants.

Petition for Removal.

PETITION FOR REMOVAL OF CAUSE FROM
THE ABOVE-ENTITLED COURT OF THE
CIRCUIT COURT OF THE UNITED
STATES, NINTH CIRCUIT, IN AND FOR
THE NORHERN DISTRICT OF CALIFOR-
NIA.

To the Honorable the Superior Court of the County
of Marin, State of California:

Your petitioner, the New York Life Insurance
Company, a corporation, respectfully shows to this
Court:

That it is one of the defendants in the above-
entitled action, and that said action is of a civil na-
ture;

That the matter and amount in dispute in said action exceeds the sum or value of Two Thousand (2,000) Dollars, exclusive of interest and costs.

That your petitioner, New York Life Insurance Company, a Corporation, was at the time of the commencement of said action, and still is a citizen and resident of the State of New York, and was at the time of the commencement of said action, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business in the City of New York in said State, and was at the time of the commencement of said action, and still is, a nonresident of the State of California; that the plaintiff Effie J. Gould Dunlevy was [5] at the time of the commencement of said action, and still is, a citizen and resident of the State of California, Northern District thereof;

That your petitioner is informed and believes, and upon such information and belief alleges, that defendant Joseph W. Gould is wrongfully joined as a party defendant with the said defendant New York Life Insurance Company, a corporation, for the sole and express purpose of defeating the jurisdiction of the United States Circuit Court, Ninth Circuit, in and for the Northern District of California; that defendant Joseph W. Gould is a nonresident of the State of California, and your petitioner is informed and believes, and upon such information and belief alleges, that he was at the time of the commencement of said action, ever since has been, and now is a resident of the State of Pennsylvania, and your

petitioner is further informed and believes, and upon such information and belief alleges, that said defendant Joseph W. Gould has not been served with the summons in said action, and that plaintiff does not intend to serve said defendant with said summons in said action nor proceed against him therein; that plaintiff well knew that she would be unable to serve said defendant Joseph W. Gould with the said summons in said action or acquire jurisdiction of him therein, and that she will be compelled to prosecute her suit against your petitioner New York Life Insurance Company alone.

That in and by plaintiff's complaint in said action it is alleged that said defendant Joseph W. Gould has no interest in the amount claimed therein to be due plaintiff from said defendant New York Life Insurance Company; that even if said defendant Joseph W. Gould were a necessary or indispensable party to this controversy, the proceeding is a severable one as between defendant Joseph W. Gould and New York Life Insurance Company, and is a controversy which is wholly between [6] citizens of different States, and which can be fully determined as between plaintiff Effie J. Gould Dunlevy and your petitioner, New York Life Insurance Company, as by a reference to the complaint in said action will more fully appear.

That in and by said complaint plaintiff claims to be the assignee of a certain policy of life insurance by the New York Life Insurance Company, your petitioner, in favor of Joseph W. Gould named as a defendant in said complaint, and plaintiff thereby

seeks to recover the contents of said policy of life insurance; that such suit might have been prosecuted in the United States Circuit Court for the Western District of Pennsylvania by said Joseph W. Gould, plaintiff's assignor, or if originally brought in a court of said State of Pennsylvania said action could have been removed by your petitioner to said Circuit Court last hereinbefore referred to.

That there is in said action a controversy which is wholly between citizens of different States, and is between them alone, and which can be fully determined as to them, namely, a controversy between your said petitioner, New York Life Insurance Company, a corporation, and the plaintiff, Effie J. Gould Dunlevy.

That your petitioner offers herewith a bond with good and sufficient security for its entering in the said Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California, on the first day of its next session, a copy of the record in this action, and for the payment of all costs that may be awarded by said Circuit Court, if said Court shall hold that this action was wrongfully or improperly removed thereto.

Your petitioner therefore prays this Honorable Court to proceed no further herein, except to make the order of [7] said removal, as required by law, and to accept said bond and surety and cause the record herein to be removed into said Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California;

And your petitioner will ever pray, etc.

NEW YORK LIFE INSURANCE COMPANY,

By J. H. GRAY,

Petitioner, Cashier and General Agent.

PAGE, McCUTCHEN & KNIGHT,

Attorneys for Petitioner. [8]

State of California,

City and County of San Francisco,—ss.

J. H. Gray, being first duly sworn, deposes and says:

That he is an officer, to wit, the cashier of the San Francisco Clearing Office of the New York Life Insurance Company, a corporation, the petitioner herein and one of the defendants in the above-entitled action, and an agent of said New York Life Insurance Company, and that he makes this affidavit on behalf of said petitioner and said defendant. That the foregoing petition is true as to his own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

[Seal]

J. H. GRAY.

Subscribed and sworn to before me this 16th day of February, 1910.

HENRY P. TRICOU,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Feby. 16th, 1910. Rob. E.
Graham, Clerk. [9]

*In the Superior Court of the State of California, in
and for the County of Marin.*

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation, and JOSEPH A. GOULD,
Defendants.

Order for Removal.

Defendant herein, New York Life Insurance Company, a corporation, having, within the time provided by law, filed its petition for removal of this cause to the Circuit Court of the United States, Ninth Circuit, for the Northern District of California, and at the same time offered its bond in the sum of five hundred (500) dollars, with good and sufficient surety, pursuant to statute, and conditioned according to law;

NOW, THEREFORE, this Court does hereby accept and approve said bond and accept said petition and does order that this cause be removed for further proceedings therein to the next Circuit Court of the United States, Ninth Circuit, for the Northern District of California, pursuant to the statutes of the United States, and that all proceedings of this court be stayed.

Dated: February 16th, 1910.

THOS. J. LENNON,

Judge.

[Endorsed]: Filed Feby. 16th, 1910. Rob. E. Graham, Clerk. [10]

*In the Superior Court of the State of California,
County of Marin.*

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation, and JOSEPH A. GOULD,
Defendants.

Bond [on Removal].

KNOW ALL MEN BY THESE PRESENTS:
That Fidelity and Deposit Company of Maryland, a
corporation duly organized and existing under and
by virtue of the laws of the State of Maryland, and
duly authorized and qualified under and by virtue of
the laws of the State of California to become sole
surety in all cases where an undertaking or bond
with any number of sureties is authorized, or re-
quired by the laws of the State of California; as
party of the first part, is held and firmly bound unto
Effie J. Gould Dunlevy, as party of the second part,
in the sum of five hundred (500) dollars, gold coin
of the United States, for the payment whereof, well
and truly to be made unto the party of the second
part, *well and truly to be made unto the party of the
second part*, her heirs, executors, and assigns, the
said party of the first part binds itself, its successors
and assigns by these presents.

Nevertheless, upon these conditions:

THAT, WHEREAS, the above-named New York
Life Insurance Company, a corporation, has peti-

tioned the Superior Court of the County of Marin, State of California, for the removal of a certain cause pending therein, wherein the said party of the second part is plaintiff, and the said New York Life Insurance Company, a corporation, is one of the defendants, to the Circuit Court of the United States, Ninth Circuit, Northern [11] District of California.

NOW, THEREFORE, if the said New York Life Insurance Company, a corporation, shall enter in the said Circuit Court of the United States on or before the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said Circuit Court of the United States, if such Court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, Fidelity and Deposit Company of Maryland has caused these presents to be subscribed with its corporate name and its corporate seal affixed by its duly authorized attorney in fact at San Francisco, California, this 16th day of February, 1910.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,

[Seal]

By JAMES W. MOYLES,

Attorney in Fact.

The within bond is hereby accepted and approved this 16th day of February, 1910.

THOS. J. LENNON,

Judge.

[Endorsed]: Filed Feby. 16, 1900. Rob. E. Graham, Clerk. [12]

Received	} From.....
by F. A. G.	
Feb. 16, 1910.	
Examined	
By F. A. G.	

*In the Superior Court of the State of California, in
and for the County of Marin.*

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation, and JOSEPH A. GOULD,
Defendants.

Demurrer.

Comes now the defendant New York Life Insurance Company, and demurs to the complaint of the plaintiff on file herein, and for grounds of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant New York Life Insurance Company.

II.

That said complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom whether the assignment therein mentioned was ever delivered to the plaintiff herein.

III.

That said complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom, whether said assignment was ever delivered to a person other than the plaintiff herein, for or on behalf of the said plaintiff, or for her benefit.

IV.

That said complaint is uncertain in this, that it [13] does not appear therein, nor can it be ascertained therefrom, that said assignment was delivered to the New York Life Insurance Company, or that the defendant New York Life Insurance Company ever received delivery of the said assignment for or on behalf of plaintiff.

V.

That said complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom, whether the defendant New York Life Insurance Company was bound by the said assignment or was obligated to recognize the said assignment, or that plaintiff has or ever did succeed to the interest of defendant Joseph W. Gould in said policy.

VI.

That said complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom, to whom the said policy was payable, or to whom the proceeds of said policy were payable.

VII.

That said complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom, who was the beneficiary named in said

policy, or to whom the proceeds of said policy were payable, as such beneficiary.

VIII.

That said complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom, particularly in paragraph III thereof, whether the sum of twenty-four hundred and seventy-nine and 70/100 (2479.70) dollars therein mentioned, was or is the cash surrender value of said policy.

IX.

That said complaint is uncertain in this, that it [14] does not appear therein, nor can it be ascertained therefrom, particularly in paragraph III thereof, whether the plaintiff herein has performed all or any of the terms and provisions of the said policy on her part to be performed, or whether any of the terms, conditions or provisions of said policy have been performed, other than those to be performed by Joseph W. Gould.

X.

That said complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom, whether or not the sum in said complaint mentioned was not paid to the defendant Joseph W. Gould.

XI.

That said complaint is ambiguous for the same reasons and in the same respects as it is hereinabove alleged to be uncertain.

XII.

That said complaint is unintelligible for the same

reasons and in the same respects as it is hereinabove alleged to be uncertain.

WHEREFORE, this defendant, New York Life Insurance Company, prays to be hence dismissed, with its costs of suit.

PAGE, McCUTCHEN & KNIGHT,

Attorneys for Said Defendant.

[Endorsed]: Filed Feby. 16th, 1910. Rob. E. Graham, Clerk. [15]

*In the Superior Court of the State of California, in
and for the County of Marin.*

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation, and JOSEPH W. GOULD,
Defendants.

Admission of Service of Demurrer to Complaint.

I hereby admit service and acknowledge receipt of a copy, this 16th day of February, 1910, of the demurrer of defendant New York Life Insurance Company to plaintiff's complaint, which said demurrer was filed in the above-entitled court on said 16th day of February, 1910.

FRANK W. TAFT,

Attorney for Plaintiff.

[Endorsed]: Filed Feby. 23, 1910. Rob. E. Graham, Clerk. [16]

*In the Superior Court of the State of California, in
and for the County of Marin.*

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation, and JOSEPH W. GOULD,
Defendants.

Affidavit of Joseph W. Gould.

State of California,
County of Los Angeles,—ss.

Joseph W. Gould, named in said action “Joseph A. Gould,” being duly sworn according to law, deposes and says that he is advised that he is not required to answer the complaint filed in the above-stated action, for the reason that prior to the institution thereof a suit had been brought in the Court of Common Pleas No. Four of Allegheny County, State of Pennsylvania, requiring him and the said Effie J. Dunlevy and others to interplead for the purpose of ascertaining to which said parties the money in the hands of the New York Life Insurance Company belongs, in which action this deponent appeared and made answer prior to the bringing of the above-stated action. Deponent denies the right of this Honorable Court to proceed further in the above-stated action or to require him to appear therein and defend therein until the determination of the action in the Court of Common Pleas No. Four of Allegheny County, Pennsylvania. And he is further ad-

vised to file the following answer under protest and only for the purpose of preventing judgment against him in default, and in filing said answer he does not submit himself to the jurisdiction of this court denying its right to proceed further until the determination of the action in Pennsylvania above stated. Subject to the above objection, and denying the jurisdiction of this court, deponent makes answer to the complaint heretofore filed, and says: [17]

That on the 24th day of January, 1889, the New York Life Insurance Company issued on deponent's life its policy No. 305,011, in the sum of Five Thousand Dollars \$5,000, wherein said company agreed to pay to his executors, administrators or assigns, the sum of Five Thousand Dollars \$5,000, upon receipt and approval at said office of proofs of his death during the continuance of said policy, after deducting therefrom all indebtedness of said company, together with any balance of premiums remaining unpaid; and the said policy provided, *inter alia*, "for the distribution of certain benefits to the insured at the termination of the tontine period named therein," which benefits were in the form of a cash surrender value amounting to the sum of twenty-four hundred and seventy-nine dollars and seventy cents, \$2479.70. On or about June 27th, 1893, being desirous of assigning said policy conditionally to his daughter, Effie J. Gould, now intermarried with R. M. Dunlevy, deponent called at the office of the New York Life Insurance Company, in the city of Pittsburgh, Allegheny County, Pennsylvania, and requested R. H. McCreary, the agent there in charge of

said office, to have said policy assigned to deponent's daughter, the said Effie J. Gould, now Dunlevy, on condition that he should die before said policy was paid in full, or before the tontine period therein was terminated, desiring to reserve to himself the right to collect any money to be paid on said policy at the termination of the tontine period named therein if deponent should so long live. The agent of said company, the said R. H. McCreary, had said assignment prepared and deponent signed the same on said McCreary's assertion that it was an assignment to deponent's said daughter of the said policy only on the condition that deponent should die before the maturity of said policy or before the termination of the tontine period named therein. Deponent did not read the assignment before executing the same, relying on the statement of the said McCreary, the agent of said company, that he [18] was assigning it conditionally in the manner hereinbefore stated. Deponent had no intention of making an absolute assignment of said policy such as appears to have been made to his daughter, Effie J. Dunlevy, or to any other person. That neither the said policy nor the assignment thereof was ever delivered to the said Effie J. Gould, now Dunlevy, to whom it was assigned, but both said policy and the assignment thereof have always been and are now in the possession of deponent, and deponent has paid all premiums maturing on said policy since said assignment, and at maturity or the termination of the tontine period therein named he supposed that he would have no difficulty in collecting the amount of the sur-

render value of said policy, but was met with said assignment.

On September 9th, 1909, deponent notified said New York Life Insurance Company not to pay any moneys due thereon unto the said Effie J. Dunlevy, or to any person or persons representing her. Deponent denies that said Effie J. Gould, now Dunlevy, has any interest in said policy, and avers that whatever there is due thereon at the present time belongs to deponent and not to the said Effie J. Gould, now Dunlevy. Deponent avers that he would not have executed said assignment had he not been informed by said McCreary, the agent of said company, that he was making a conditional assignment of said policy, and that the same was to be effective in case of deponent's death only before the maturity thereof or the termination of the tontine period named therein, and to be void in case deponent should be living at the time of the premiums of said policy should be paid in full and at the termination of the tontine period named therein.

Deponent further avers that the said Effie J. Gould, now Dunlevy, had no knowledge whatever of the assignment of said policy to her by this deponent until so notified by the said New York Life Insurance Company after the termination of the said tontine period named therein. And deponent further avers that the said New York Life Insurance Company knew or ought to have known through its [19] agent at Pittsburgh, Pennsylvania, the said R. H. McCreary, that said policy was assigned to his daughter, the said Effie J. Gould, now Dunlevy, on

condition that if deponent should die before the maturity thereof, that said assignment was to be an absolute one, otherwise the surrender value of said policy was to be paid to deponent in case he was living at the termination of the tontine period named therein, and avers that he was misled by said company's agent in making of said absolute assignment; and further avers that neither said policy nor the assignment thereof has been at any time since the issuing of said policy and the making of said assignment in the possession of the said Effie J. Gould, now Dunlevy, but that the said policy and the said assignment have always remained in the possession of deponent. And he denies that the said Effie J. Gould, now Dunlevy, ever paid any consideration to deponent for the assignment thereof; and avers that said assignment was made only for the purpose of protection to the said Effie J. Gould, now Dunlevy, in case of deponent's death before the maturity of said policy or the termination of the tontine period named therein.

By reason of the matters hereinbefore set forth, deponent avers that he is entitled to have the surrender value of said policy paid to him in full, to wit, the sum of \$2,479.70, and that no part of said sum should be paid to the said Effie J. Gould, now Dunlevy.

JOSEPH W. GOULD.

Sworn to and subscribed before me this 28th day of February, 1910.

[Seal].

MAY E. NUNEZ,

Notary Public in and for the City and County of
Los Angeles, State of California.

[Endorsed]: Filed March 2d, 1910. Rob. E. Graham, Clerk. [20]

[Certificate of Clerk to Transcript of Record on Removal.]

Office of the County Clerk,

Of the County of Marin, State of California,—ss.

I, Robert E. Graham, County Clerk of the County of Marin and State aforesaid, and ex-officio Clerk of the Superior Court thereof, do hereby certify that I have compared the foregoing Transcript of Record on removal of cause, entitled *Effie J. Gould Dunlevy vs. New York Life Insurance Co., a Corporation, et al.*, and of the endorsements thereupon, with the original record of the same remaining in this office, and that the same is a correct copy thereof, and of the whole of said original record.

WITNESS my hand and the seal of said court this 3d day of March, 1910.

[Seal]

ROBT. E. GRAHAM,

Clerk.

By F. S. Holland,

Deputy Clerk.

[Endorsed]: Filed Mar. 7, 1910. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [21]

[Return of Sheriff on Summons.]

Office of the Sheriff
of Los Angeles County, Cal.,

I HEREBY CERTIFY that I received the within Summons on the 18th day of January, A. D. 1910, and personally served the same on the 7th day of February, A. D. 1910, on Joseph A. Gould, whose real name is Joseph W. Gould, being one of the defendants named in said Summons, by delivering to said defendant personally in the said County of Los Angeles, a copy of said Summons, and a copy of the Complaint in the action named in said Summons, attached to said copy of Summons.

Dated this 7th day of February, A. D. 1910.

W. A. HAMMEL,
Sheriff.

By M. H. Pritchard,
Deputy Sheriff. [22]

*In the Superior Court of the State of California, in
and for the County of Marin.*

EFFIE J. GOULD DUNLEVY,
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation, and JOSEPH A. GOULD,
Defendants.

Action brought in the Superior Court in and for the County of Marin, State of California, and the complaint filed in the office of the Clerk of said County.

F. W. TAFT,
Plaintiff's Attorney.

Summons.

The People of the State of California Send Greeting to New York Life Insurance Company, a Corporation, and Joseph A. Gould, Defendants.

YOU ARE HEREBY REQUIRED TO APPEAR in an action brought against you by the above-named plaintiff, in the Superior Court, in and for the County of Marin, State of California, and to answer the complaint filed therein, within ten days (exclusive of the day of service), after the service on you of this Summons, if served within this county; or if served elsewhere, within thirty days.

And you are hereby notified that if you fail to appear and answer the said Complaint, as above required, the said plaintiff will take judgment for any money or damages demanded in the Complaint as arising upon contract, or will apply to the Court for any other relief demanded in the complaint.

Given under my hand and the Seal of the Superior Court, in and for the County of Marin, State of California, this 14th day of January, in the year of our Lord, one thousand nine hundred and ten. [23]

[Seal]

ROBT. E. GRAHAM,

Clerk,

By F. S. Holland,
Deputy Clerk.

[Endorsed]: Filed Apr. 25, 1910. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.
[24]

At a stated term, to wit, the March term, A. D. 1910, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 14th day of March, in the year of our Lord one thousand nine hundred and ten. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,041.

EFFIE J. GOULD DUNLEVY

vs.

NEW YORK LIFE INS. CO. et al.

Order Sustaining Defendant's Demurrer.

Defendant's demurrer to the complaint herein came on this day to be heard, and being confessed by attorney for plaintiff, it was ordered that said demurrer be and the same is hereby sustained, with leave to plaintiff to amend within 10 days. [25]

At a stated term, to wit, the March term, A. D. 1910, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 21st day of March,

in the year of our Lord one thousand nine hundred and ten. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,041.

EFFIE J. GOULD DUNLEVY

vs.

NEW YORK LIFE INSURANCE CO et al.

**Order Setting Aside Order of March 14, 1910, and
Order Overruling Demurrer.**

Upon motion of Frank W. Taft, Esq., attorney for plaintiff, and by consent of attorneys for defendants, it was ordered that the order entered March 14, 1910, sustaining defendant's demurrer, be and the same is hereby set aside. Thereupon defendant's demurrer to the complaint herein was submitted to the Court and it was ordered that said demurrer be and the same is hereby overruled. [26]

*In the Circuit Court of the United States, Ninth
Circuit, Northern District of California.*

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation, and JOSEPH W. GOULD,
Defendants.

**Answer of Defendant, New York Life Insurance
Company, a Corporation.**

Comes now the New York Life Insurance Company, one of the defendants above named, and an-

swering the complaint of the plaintiff on file herein;

Alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations in paragraph two (II) of said complaint, and basing its denial upon that ground denies that defendant Joseph W. Gould is the father of the plaintiff herein.

Alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations in paragraph four (IV) of said complaint, and basing its denial upon that ground denies that on or about the 27th day of June, 1903, or at any other time, defendant Joseph W. Gould made and executed, or made or executed, that certain instrument in writing set forth in *haec verba* in said complaint on page two (2) thereof;

Admits that this defendant did on the 30th day of June, 1893, receive a paper in the words and figures as set forth in the said complaint, paragraph four (4) thereof, purporting to have been executed by the defendant Joseph W. Gould. [27]

Alleges that it has no information or belief upon the subject sufficient to enable it to deny the allegations in paragraph five (5) of said complaint, and basing its denial upon that ground denies that the Effie J. Gould, named in the instrument mentioned and described in said complaint, is the plaintiff herein.

Denies that the sum of twenty-four hundred and seventy-nine and 70/100ths (\$2,479.70) dollars, is now, or ever or at all was, due and payable, or due

or payable, from this defendant to the plaintiff herein.

Alleges that it has no information or belief upon the subject sufficient to enable it to deny the allegations in paragraph seven (7) of said complaint, and basing its denial upon that ground denies that the original policy mentioned in said complaint is now, or ever at all was, in the possession of the defendant Joseph W. Gould, or that the duplicate of the instruments, or any thereof, mentioned in the said complaint, paragraph four (IV) thereof, are now or ever at all were in the possession of the defendant Joseph W. Gould.

Admits that defendant Joseph W. Gould claims a right to the proceeds of the said policy, to wit, the sum of twenty-four hundred and seventy-nine and 70/100ths (\$2,479.70) dollars, but denies that such claim was or is without any right whatsoever.

Further answering said complaint this defendant alleges that on or about the 24th day of January, A. D. 1889, this defendant executed and delivered to the defendant Joseph W. Gould a policy upon the life of said defendant, which said policy was numbered 305,011. That prior to the commencement of this action there became due and payable, under and by virtue of the terms of said policy, the sum of twenty-four hundred and seventy-nine and 70/100ths (\$2,479.70) [28] dollars; that prior to the commencement of this action and on or about the 25th day of August, 1909, defendant Joseph W. Gould notified this defendant that he claimed an interest in the proceeds of the said policy, and that none of

the proceeds thereof were to be paid to the plaintiff herein or to any person claiming under her.

That prior to the commencement of this action and prior to the 10th day of November, 1909, there was commenced in the Court of Common Pleas, of the County of Alleghany, Commonwealth of Pennsylvania, an action for the recovery of money or property against the plaintiff herein, which said action is entitled,

Boggs & Buhl vs. Effie J. Dunlevy.

That on said 10th day of November, 1909, there was issued out of said court, under and by virtue of the laws of said State of Pennsylvania, a writ of garnishment, which said writ of garnishment was duly and regularly served upon his defendant, commanding and directing it to withhold from the plaintiff herein all moneys or other property in its possession belonging to, owned by, or owing to her.

That thereafter and prior hereto, the exact time whereof is to this defendant unknown, there were commenced in said Court of Common Pleas, said County of Alleghany, said State of Pennsylvania, numerous other actions at law for the recovery of money or other property against the plaintiff herein named, among which were the following:

Lincoln National Bank of Pittsburgh, a Corporation, Plaintiff, vs. Effie J. Dunlevy, Defendant.

Charles Elsto, Plaintiff, vs. Effie J. Dunlevy, Defendant.

That in said last-mentioned actions, and each of them, there were issued out of said court, under and

by virtue of the laws of said State of Pennsylvania, writs of garnishment, which said writs of garnishment were duly and regularly served on [29] this defendant, commanding and directing it to withhold from the plaintiff herein all monies or other property in its possession belonging to, owned by, or due to her.

That plaintiff and defendant Joseph W. Gould have, and each of them has, appeared in said action of Boggs & Buhl vs. Dunlevy, and have therein set up their respective rights in and to the said policy of insurance and the proceeds thereof and in and to said sum of twenty-four hundred and seventy-nine and 70/100ths (\$2479.70) dollars. That the said Court of Common Pleas, in the said County of Alleghany, Commonwealth of Pennsylvania, in said action of Boggs & Buhl vs. Dunlevy, has jurisdiction to try and determine the respective rights of all the parties hereto.

That prior hereto the said Court of Common Pleas in the County of Alleghany, Commonwealth of Pennsylvania, by its order duly given and made in the said action of Boggs & Buhl vs. Dunlevy, ordered this defendant to pay into said court said sum of twenty-four hundred and seventy-nine and 70/100ths (\$2479.70) dollars.

That thereupon and pursuant to said order this defendant paid into said court said sum of twenty-four hundred and seventy-nine and 70/100ths (\$2479.70) dollars, there to wait the determination of said court as to its disposition.

WHEREFORE this defendant prays to be hence

ceipt of a copy is hereby admitted this 31st day of March, 1910.

FRANK W. TAFT,
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 1, 1910. Southard Hoffman, Clerk. J. A. Schaertzer, Deputy Clerk. [31]

*In the Circuit Court of the United States, for the
Northern District of California.*

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation, and JOSEPH W. GOULD,
Defendants.

Amended Answer.

Comes now New York Life Insurance Company, a corporation, one of the defendants above named, and as of course files this, its amended answer, and answering the complaint of plaintiff on file herein, admits, denies and alleges, as follows:

Admits that this defendant issued its policy of insurance in form and in effect as alleged in paragraph 3 of the complaint herein, but denies that there is now due from this defendant the sum of twenty-four hundred and seventy-nine and 70/100 (2479.70) dollars, or any sum. Denies that the sum of twenty-four hundred and seventy-nine and 70/100 (2479.70) dollars has never been paid, and that the same is now, or ever or at all was, due and payable, or due or pay-

able, from this defendant to the plaintiff, or that said sum of twenty-four hundred and seventy-nine and 70/100 (2479.70) dollars has never been paid, or that the same is now, or ever or at all was, due and payable, or due or payable, from this defendant to plaintiff. Denies that the claim of defendant Joseph W. Gould to the said sum of twenty-four hundred and seventy-nine and 70/100 (2479.70) dollars is without any right whatsoever.

And for a SECOND AND SEPARATE DEFENSE, this defendant alleges: [32]

That on or about the 24th day of January, 1889, this defendant entered into a contract with defendant Gould, as evidenced by its policy number 305,011, then and there duly made and delivered to said defendant Gould, by the terms of which this defendant undertook to and did insure the life of said defendant Gould for the sum of five thousand (5,000) dollars, payable at the Home Office of this defendant in the city of New York, to the insured's executors, administrators or assigns upon receipt and approval at said Home Office of proofs, as therein required, of the death, during the continuance of said policy, of said insured; that said policy was written on the ordinary life nonforfeiting limited tontine plan, and further provided that if said insured should be living at the completion of the tontine period therein named, namely, on the 22d day of January, 1909, and said policy should then be in force, said insured would be entitled to a choice of certain benefits therein stated, it being understood and agreed that not less than three (3) months prior to the ter-

mination of said tontine period, said insured should notify this defendant, in writing, which of said benefits was selected, and if no such notification should be received by this defendant, then the surplus should be applied to an annuity in one of the forms stipulated in the "First Benefit" named therein. That a copy of said policy is set forth in Exhibit "A," hereunto annexed, and said policy is hereby referred to and made a part hereof.

That this defendant is informed and believes, and upon such information and belief alleges, that on or about the 27th day of June, 1893, defendant Gould, being desirous of assigning said policy conditionally to his daughter, the plaintiff herein, provided he should die prior to the completion of the tontine period above mentioned, thereupon made, executed and delivered to this defendant the instrument, a copy whereof is set forth in paragraph 4 of the plaintiff's complaint herein. Upon the same [33] ground this defendant alleges that said instrument was made on condition that if said defendant Gould should be alive at the time of the completion of the tontine period under the said policy, namely, on the 22d day of January, 1909, he would be entitled to the proceeds of the said policy, and it was made with no intention of making an absolute assignment of the said policy to the plaintiff herein, or to any other person; that neither said policy nor said assignment was ever delivered to the plaintiff, but said policy has always and up to the time of the payment of the proceeds thereof, as hereinafter mentioned, remained in the possession of said defendant Gould,

and said defendant Gould paid all premiums on the said policy; that said assignment was delivered to this defendant in conformity with this defendant's rules, and not otherwise.

And for a **THIRD AND SEPARATE DEFENSE**, this defendant alleges:

That on or about the 24th day of January, 1889, this defendant entered into a contract with defendant Gould, as evidence by its policy number 305,011, then and there duly made and delivered to said defendant Gould, by the terms of which this defendant undertook to and did insure the life of said defendant Gould for the sum of five thousand (5,000) dollars, payable at the Home Office of this defendant in the City of New York, to the insured's executors, administrators or assigns upon receipt and approval at said Home Office of proofs, as therein required, of the death, during the continuance of said policy, of said insured; that said policy was written on the ordinary life nonforfeiting limited tontine plan, and further provided that if said insured should be living at the completion of the tontine period therein named, namely, on the 22d day of January, 1909, and said policy should then be in force, said insured would be entitled to a choice of certain benefits therein stated, it being understood and agreed that not less than three (3) months prior to the [34] termination of said tontine period, said insured should notify this defendant, in writing, which of said benefits was selected, and if no such notification should be received by this defendant, then the surplus should be applied to an annuity in one of the

forms stipulated in the "First Benefit" named therein. That in accordance with the terms of said policy, there became due, prior to the 18th day of June, 1909, from the defendant to defendant Gould, the sum of twenty-four hundred and seventy-nine and 70/100 (2479.70) dollars. That a copy of said policy is set forth in Exhibit "A," hereunto annexed, and said policy is hereby referred to and made a part hereof.

That this defendant is informed and believes, and upon such information and belief alleges, that on or about the 27th day of June, 1893, defendant Gould, being desirous of assigning said policy conditionally to his daughter, the plaintiff herein, provided he should die prior to the completion of the tontine period above mentioned, thereupon made, executed and delivered to this defendant the instrument, a copy whereof is set forth in paragraph 4 of the plaintiff's complaint herein. Upon the same ground this defendant alleges that said instrument was made on condition that if said defendant Gould should be alive at the time of the completion of the tontine period under the said policy, namely, on the 22d day of January, 1909, he would be entitled to the proceeds of the said policy, and it was made with no intention of making an absolute assignment of the said policy to the plaintiff herein, or to any other person; that neither said policy nor said assignment was ever delivered to the plaintiff, but said policy has always and up to the time of the payment of the proceeds thereof, as hereinafter set forth, remained in the possession of said defendant Gould, and said

defendant Gould paid all premiums on the said policy; and said assignment was delivered to this defendant in conformity with this defendant's [35] rules, and not otherwise. That prior to the date next hereinafter named, both plaintiff herein and defendant Gould made demand upon this defendant for said sum of twenty-four hundred and seventy-nine and 70/100 (2479.70) dollars, the proceeds of the said policy.

That on or about the 18th day of June, 1907, plaintiff herein, being indebted to Boggs & Buhl, Inc., a corporation organized and existing as such, for and on account of goods, wares and merchandise theretofore sold and delivered by said Boggs & Buhl, Inc., to plaintiff herein, said Boggs & Buhl, Inc., commenced an action in the Court of Common Pleas Number 4, in and for the County of Allegheny, State of Pennsylvania, said court being a court of record and having a seal, against the plaintiff herein, for the recovery from the plaintiff herein of the value of said goods, wares and merchandise; that thereafter, and on the 18th day of June, 1907, a subpoena duly issued out of and under the seal of said court, directed to the plaintiff herein, commanding and directing that she be and appear before the said court on the first Monday of July, 1907, to answer the said Boggs & Buhl, Inc.; that thereafter, and on the 24th day of June, 1907, said subpoena was duly served on the plaintiff herein, by handing a true and attested copy thereof to an adult member of said plaintiff's family at her dwelling-house; that thereafter, and on the 8th day of July, 1907, judgment was duly

given and made in said action by said court in favor of said Boggs & Buhl, Inc., and against plaintiff herein for the sum of five hundred and thirty-seven and 76/100 (573.76) dollars, and on or about the 10th day of November, 1909, in said action, an execution attachment was issued out of and under the seal of said court, which said execution attachment was thereafter, and on or about the 11th day of November, 1909, duly served upon this defendant in said County of Allegheny, State of Pennsylvania, by handing a true and attested copy thereof to F. W. Hubbard, an agent of the defendant duly authorized to receive service thereof, and on the same day said [36] execution attachment was served upon the defendant Gould by handing a true and attested copy thereof to an adult member of his family at his dwelling-house.

That at all times herein mentioned, this defendant was doing, and authorized to do, a general life insurance business in the State of Pennsylvania, and in the County of Allegheny, said state.

That thereafter, it appearing that plaintiff herein and defendant Gould and others, made claim to the proceeds of said policy, this defendant, in said action of Boggs & Buhl, Inc., against plaintiff herein, prayed for a rule upon said defendant Gould, plaintiff, and said Boggs & Buhl, Inc., to show cause why they should not interplead together for the purpose of ascertaining to which of said last named persons the same sum of twenty-four hundred and seventy-nine and 70/100 (2479.70) dollars, the proceeds of said policy in the hands of this defendant, belonged,

and for leave to pay the said sum into the said court for the benefit of such person as should appear to be entitled thereto.

That thereafter, and on or about the 5th day of February, 1910, said rule was by said Court granted on plaintiff, defendant Gould and said Boggs & Buhl, Inc., to show cause why they should not interplead together for the purpose of ascertaining to which of said last named parties the money in the hands of this defendant belonged, and why this defendant should not be permitted to pay the same into the said Court for the benefit of such person as might appear to be entitled thereto; and said Court further ordered that service of the said rule be made upon plaintiff by serving her personally with a copy of the said petition of this defendant, and of the said order, or by sending to her a copy of each by mail; that thereafter, and on or about the 18th day of February, 1910, a copy of the said petition, together with a copy of the said order, was served on plaintiff by [37] personally delivering to, and leaving with, her a true and correct copy thereof. That thereafter, and on the third day of March, 1910, said rule to show cause was by the said Court made absolute. That thereafter, and prior to the date next hereinafter mentioned, said Boggs & Buhl, Inc., and defendant Gould filed their answers, respectively, to said rule.

That thereafter, and on or about the third day of May, 1910, the said Court ordered that a feigned issue be tried, which said feigned issue was as follows, to wit:

“Whether Joseph W. Gould made a valid gift of policy number 305,011, issued to him by the New York Life Insurance Company, to Effie J. Gould, now Effie J. Dunlevy.”

That in March, 1910, the said Court, by its order duly given and made, ordered that plaintiff herein be plaintiff in the said feigned issue so framed, and that defendant Gould be defendant in the said feigned issue so framed.

That thereafter, and on or about the 19th day of March, 1910, by leave of the Court first had and obtained, this defendant paid into the said court said sum of twenty-four hundred and seventy-nine and 70/100 (2479.70) dollars.

That thereafter, and on or about the 19th day of September, 1910, a trial was had of the feigned issues so framed, wherein defendant therein, defendant Gould herein, had judgment against the plaintiff therein, plaintiff herein.

That thereafter, and on or about the first day of October, 1910, said sum of twenty-four hundred and seventy-nine and 70/100 (2479.70) dollars, less eight and 70/100 (8.70) dollars poundage, was, by order of the said Court, paid to defendant Gould.

All of the foregoing will more fully appear from a copy of the proceedings had and obtained in said action of Boggs & Buhl, Inc., versus Effie J. Dunlevy, reference to which is hereby [38] made, and which said copy is made a part hereof.

WHEREFORE, defendant NEW YORK LIFE INSURANCE COMPANY prays to be hence dismissed with its costs herein.

PAGE, McCUTCHEN & KNIGHT,
PAGE, McCUTCHEN, KNIGHT &
OLNEY,

Attorneys for Defendant New York Life Insurance
Company. [39]

State of California,

City and County of San Francisco,—ss.

F. E. Boland, being first duly sworn, says:

That he is an employee of the firm of Page, McCutchen, Knight & Olney, attorneys for NEW YORK LIFE INSURANCE COMPANY, one of the defendants named in the foregoing answer, and as such employee has charge of the within entitled action and is familiar with the matters set forth in said answer. That the officers of said defendant are, and each of them is, without the City and County of San Francisco, and therefore affiant makes this verification on behalf of said defendant. That he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

F. E. BOLAND.

Subscribed and sworn to before me, this 7th day of December, A. D. 1911.

[Seal]

HENRY P. TRICOU,
Notary Public in and for the City and County of
San Francisco, State of California. [40]

Exhibit "A" [to Amended Answer—Transcript of Proceedings Had in Court of Common Pleas No. 4, County of Allegheny, Pa., in Boggs & Buhl vs. Dunlevy].

EXEMPLIFICATION OF RECORD.

Commonwealth of Pennsylvania,
Allegheny County,—Sct.

Among the Records and Proceedings of the Court of Common Pleas No. Four in and for the County of Allegheny, and State of Pennsylvania, the following may be found as matter of File and of Record at No. 777, Third Term, 1907.

**Appearance Docket Entry in Boggs & Buhl vs.
Dunlevy.**

BOGGS & BUHL

vs.

EFFIE J. DUNLEVY.

June 18, 1907.

Summons in Assumpsit to 1st Monday July, 1907, afft. and Statement filed. Served June 24, 1907. July 8, 1907, judgment against deft. in default of appearance for five hundred thirty-seven and 76/100 dollars (\$537.76).

No. 253—First Term, 1910.

Feigned Issue.

No. 2, Second Term, 1910. [41]

*In the Court of Common Pleas No. 4 of Allegheny
County, Pa.*

No. 777—Third Term, 1907.

BOGGS & BUHL

vs.

EFFIE J. DUNLEVY.

To W. B. Kirker, Pro.

Issue Summons in Assumpsit against the above-named defendant, returnable next return day, sec. reg.

WILLIS F. McCOOK,

Attorney for Plaintiff.

**Statement and Claim [in Boggs & Buhl vs.
Dunlevy].**

Boggs & Buhl, a corporation, above named, claims of the defendant above named the sum of \$497.14, with interest from Feb. 26, 1906. Between May 12, 1905, and April 26, 1906, the plaintiff sold and delivered to the defendant certain goods and merchandise as set forth in the itemized statement of account hereto attached and made part of this statement; the prices charged for the respective goods on the respective dates are the reasonable and usual charges for the said goods and the prices agreed upon between the plaintiff and the defendant at the time of the said purchases.

At the time that each of the enumerated articles were sold, the defendant agreed specially to pay for the same and to charge her separate estate therefor. And the plaintiff avers that it was upon this special

arrangement and assurance of the defendant that the goods were sold and delivered.

Plaintiff further avers that the defendant is a married woman but that her husband at the time of the said sales was not financially responsible and is not now financially responsible. The itemized statement hereto attached is a true and correct copy [42] of the plaintiff's books of original entry. The full amount of the sales is \$579.49 for which defendant is entitled to a credit for goods returned amounting to \$212.35 and \$50, cash payment, leaving a balance due of \$497.14, for which this suit is brought.

BOGGS & BUHL,
Per W. C. GEORGE.

State of Pennsylvania,
County of Allegheny,—ss.

W. C. George, being duly sworn, deposes and says that he has knowledge of the allegations contained in this statement of claim, having special charge of this account, and that he is the agent of the plaintiff company to make this affidavit, and that the allegations contained in the foregoing statement of claim are true and correct.

W. C. GEORGE.

Sworn to and subscribed before me this 18th day of June, 1907.

[Seal]

J. C. SHERRIFF,
Notary Public.

My commission expires January 16th, 1909. [43]

BOGGS & BUHL,
Incorporated,
DRY GOODS.

Allegheny, Pa., May 31, 1907.

SOLD TO

Mrs. R. M. Dunlevy,

58 Sprague Ave., 231 Lehigh Ave., Pitts-
burgh, Pa.,

Bellevue, Pa.

All bills are NET CASH, due when rendered.
1905.

May	12.	3 cd. Buttons ..	.08		.24
	13.	1 pr. Booties ...			.65
	16.	1 pr. Shoes	2.50		
		1 Pin .....	.75		
		4 pr. Hose.....	.25	1.00	4.25
	17.	1 Tie .....	.50		
		2 pr. Drawers for	1.00		
		14 yds. Swiss ...	.10	1.40	
		1 Belt .....	.25		3.15
	23.	1 Skirt	1.25		
		1 Skirt	1.00		
		1 Corset	2.00		
		1 Bustle .....	.50		4.75
	27.	2 Skirts	1.50	3.00	
		1 Suit	27.50		30.50
June	28.	6 Collars for	1.50		
		1 Hair Roll .....	.25		
		1 yd. Batiste ...	1.00		2.75
July	8.	4 pr. Hose for...	2.00		
		6 pr. Hose " ...	2.00		[44]

July	8.	3 pr. Hose for...	2.00	6.00
July	10.	1 Skirt	1.00	
		1 pr. Suspenders	.25	1.25
	15.	1 pr. Oxfords ...	3.50	
		1 " " ...	4.00	
		2 Caps .... .50	1.00	8.50
	19.	1 Skirt	1.50	
		1 Wash Suit	8.50	
		1 Comb ..	.25	10.75
		1 Comb ....	.50	
Aug.	7.	1 pr. Supporters.	.25	
		1 Waist.....	.25	
		1 pr. Gloves	1.00	
		1 pr. Oxfords....	2.00	3.50
	9.	2 Ties .... .50	1.00	
		6 Collars for.....	.75	
		1 pr. Suspenders.	.50	2.25
	10.	1 dz. Hdkfs.....	1.50	
		5 Hdkfs. .... .03	.15	
	10	" "15	1.50	
		6 Collars for.....	.75	
		2 L. Skirts.....8.50	17.00	20.90
				<hr/>
				99.44
	11.	3 Waists .... .25	.75	
		1 Petticoat	2.00	
		2 pr. Drawers .. .50	1.00	
		1 Belt ..	.50	4.25
	12.	1 Suit	2.50	
		1 Suit	1.00	
		1 Cap .....	.50	
		1 Bustle .....	.50	

		1 pr. Supporters.	.50		
		2 W. Waists	1.50	3.00	8.00
Aug.	14.	1 Corset		2.50	2.50
Aug.	29.	1 Velocipede ...		3.00	3.00
Sept.	29.	1 Cap .....		.50	.50
Oct.	7.	2 pr. Shoes	4.00	8.00	
		1 " "		3.50	
		1 " "		2.50	14.00
Oct.	23.	1 Hat		8.00	
		1 Vest .....		.70	8.70
	25.	3 pr. Pants .....	.70	2.10	
		2 Vests .....	.70	1.40	
		1 Shirt		1.00	
		1 yd. Veiling....		.50	
		1 yd. " ...		.85	
		2 Boys' Suits ...	7.50	15.00	20.85
	28.	1 pr. Gloves.....		1.00	
		3 " Drawers..	.75	2.25	
		1 Gown		1.00	
		1 Gown .....		.75	
		3 Chemises		2.25	
		6 pr. Soxs for...		2.00	
		6 pr. Hose " ..		2.00	
		6 pr. Hose " ..		2.00	
		3 pr. Drawers...	1.00	3.00	
		1 Shirt		1.00	17.25
Nov.	2.	4 pr. Swiss Cur-			
		tains .....	.85	3.40	
		3 C. Vests .....	.50	1.50	4.90
	8.	1 Squirrel Collar		6.50	
		1 Corset		5.00	

		1 Corset	3.00	
		1 Coffee Pot	1.00	
		2 Spoons .. . . . .05	.10	15.60
[46]				
Nov.	9.	1 Squirrel Scarf.	8.50	8.50
	11.	$\frac{3}{4}$ yds. Ribbon..1.00	.75	.75
	13.	1 Side Comb . . . .	.50	
		1 n. Comb.....	.50	
		1 Hair Rat.....	.25	
		2 pkgs. Hair Pins		
			.05	
			.10	1.35
Dec.	6.	1 Corset		1.00
	7.	1 Hdkf. . . . . .		.50
				<hr/>
				211.09
	13.	1 Scarf . . . . .	.50	
		1 qr. Paper . . . .	.10	
		1 Cushion . . . . .	.25	
		5 yds. Crash10	.50	
		5 W. Cloths05	.25	
		1 pr. Scissors . . .	.25	
		1 Cuff Pins . . . .	.10	
		2 pr. Lacers05	.10	2.05
	14.	1 Bt. Trimming.	.28	
		6 Str. Trimming. .05	.30	
		1 Bell05	
		2 Ducks05	.10	
		1 Stocking25	
		1 Moss05	
		1 Snow05	
		1 Tree Holder ..	.50	
		2 Toys25	.50	

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		1 Magic Lantern	.50	
		3 Ornaments10	.30	
		2 Ornaments05	.10	
		1 Ornament05	
		1 Horn	1.50	
		1 Drum	1.00	[47]
Dec.	14.	1 Board . . . . .	.75	
		1 Ten Pins . . . . .	.75	
		1 Head . . . . .	.85	
		1 Tree . . . . .	.50	8.38
	15.	1 Waist	3.00	
		1 pr. Gloves	1.00	
		1 Gold Belt	1.00	
		1 Scarf . . . . .	.50	
		1 yd. Veiling . . . . .	.35	5.85
	16.	1 Book . . . . .	.35	
	16.	1 Book . . . . .	.80	
		1 Book	1.00	
		1 dz. Tumblers . . . . .	.75	
		1 Lamp Trim- ming	1.00	
		1 Brass Ring . . . . .	.25	
		1 Book . . . . .	.85	4.70
	19.	1 Watch Fob	2.25	
		1 Kettle	1.00	
		2 Kettles60	1.20	
		1 pr. Gloves	1.00	
		2 Ties50-.25	.75	6.20
	20.	1 Buffer	2.25	
		1 Shoe Hook	1.00	
		1 C. Knife	1.00	

vs. Effie J. Gould Dunlevy. 51

	1 File	1.00	
	1 Shoe Horn	1.25	6.50
21.	1 Bolt Ribbon ..		.60
27.	1 Waist		5.00
	1 pkg. Needles ..	.05	
30.	1 Waist	4.00	
	1 pr. Shoes,.....	2.00	
	1 Hose Supporter	.75	
	1 pr. Hair Pins..	.05	
	1 yd. Elastic....	.04	6.89

[48]

257.26

1906

Jan.	4.	1 Waist	3.50	
		1 Clock	1.35	
		2 pr. Shoes ....4.00	8.00	12.85
10.		1 pr. Gloves.....	.25	
		1 pr. Gloves ....	.50	
		1 pr. Gloves ....	.75	1.50
13.		2 pr. Gloves... .50	1.00	
		1 Skirt Suppor- ter .....	.25	
		1 pkg. Hair Pins.	.05	1.30
16.		1 pr. Pants		1.00
18.		6 Collars for ....	.75	
		1 Waist	4.50	
		1 Lace Collar ...	1.25	6.50
24.		4 pr. Hose for...	1.00	
		1 Satchel	11.50	12.50
30.		1 Veil50

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Feb.	7.	1 pr. Shoes	3.50	
		1 Waist	8.50	12.00
	21.	1 Waist		5.00
March	5.	1 pr. Boys Shoes		2.50
	13.	1 pr. Boots		2.50
	16.	1 pr. Drawers ..	.50	
		1 pr. Drawers ..	.25	
		1 pr. Drawers ...	.75	
		2 pr. Hose.....	.25 .50	
		1 pr. Hose .....	.35	
		2 Aprons .....	.35 .70	
		2 Aprons .....	.25 .50	
		1 Apron .....	.75	4.30
[49]				
March	20.	¾ yds. Felt.....	1.25 .94	
		1 pr. Gloves ....	.50	1.44
	24.	1 pr. Gloves	1.25	
		1 pr. Gloves ....	.50	1.75
	27.	1 Umbrella		2.00
	29.	1 yd. Veiling....		.50
April	4.	Alteration on suit	2.00	
		2 Boys' Suits....	8.50 17.00	
		1 Boy's Suit....	7.50	
		1 Boy's Suit....	5.00	31.50
	5.	1 Blue Suit.....	22.50	
		1 Suit	22.50	45.00
				<hr/>
				401.90
	7.	1 Suit	3.50	
		1 Suit	8.50	
		1 Suit	5.00	
		2 Caps .....	.75 1.50	18.50

11.	2	Waists	4.50	9.00	
	1	Waist		5.00	14.00
12.	8	pr. hose.....	.25		2.00
14.	1	pr. Shoes		4.00	
	1	pr. Shoes		2.50	
	1	Fancy Vest ...		5.00	
	1	Hat		10.00	
	1	Hat		8.00	
	1	Hat		7.50	
	1	Suit.....		2.75	
	1	Suit.....		22.00	
	3	C. Waist ....	.25	.75	
	1	Waist		4.50	
	1	Set Pins.....		1.00	
	1	Set Studs .....		.35	

[50]

April	14.	1	Shirt	2.00	
		1	Collar .....	.15	
		1	Tie .....	.35	
		1	Bronz Bust ...	11.00	
		1	pr. Gloves.....	1.00	
		1	Hair Curlers...	.10	
		1	Hair Curler...	.25	
		1	pr. Supporters.	.25	
		2	Cube Pins.....	.20	
		1	dz. Hdkfs.	2.85	
		1	dz. "	1.50	
		1	Wagon	1.25	89.25
	17.	2	pr. Cuffs.....	.25	.50
		2	Linen Collars..	.12 $\frac{1}{2}$	.25
		1	Hat	9.00	9.75
	19.	1	Hand Bag.....		1.25

	27.	1 dz. Towels....	3.00	
		3 pr. Hose.....	1.00	
		3 pr. Curtains...3.00	9.00	
		3 pr. Curtains... for	13.50	
		2 Cloths .....2.50	5.00	31.50
May	4.	1 dz. Cups and Saucers		3.25
	11.	1 Hair Roll.....	1.50	
		1 pkg. H. Pins...	.05	
		1 cs. S. Pins....	.07	
		1 cs. S. Pins....	.08	
		1 Sp. Cotton.....	.05	
		1 pkg. Needles...	.05	
		1 pr. Scissors....	.50	
		1 pr. Supporters.	.25	2.55
				<hr/>
				573.95
[51]				
May	16.	1 Waist.....	1.50	
		1 Waist.....	1.75	
		1 Corset	2.00	
		1 Corset	2.50	
		1 Lacer .....	.10	
		2 Gowns .....1.00	2.00	9.85
	25.	3 Awnings for...		26.00
June	2.	1 dz. Hdks....		1.50
	11.	1½ Sk. Yarn....	.27	
		1 Book .....	.35	
		1 C. Set.....	.50	
		1 B. Box.....	1.00	
		1 pr. Oxfords....	4.00	
		1 pr. Oxfords....	3.50	9.62

July	20.	1 White Belt....	.50	
		3 pr. Hose for...	1.00	
		3 " " " ...	1.00	
		1 Wht. Skirt....	4.50	
		1 Wht. Skirt....	3.75	
		1 Tan Skirt.....	4.50	
		2 Skirts .....1.50	3.00	
		2 Shirts for.....	2.00	
		3 pr. Drawers... .50	1.50	
		1 Petticoat	2.00	
		2 C. Covers..... .25	.50	
		2 pr. Drawers... .75	1.50	25.75
	22.	1 Ironing Board.		1.25
	20.	1 yd Veiling.....		.50
	31.	1 Corset	4.00	
		1 pr. Boy's Shoes.	2.25	
		3 Chamois 10/-		
		10/20 .....	.40	
		1 Bottle Perfume	.60	
		2 Belts 10/25....	.35	
[52]				
July	31.	1 Skirt Supporter	.25	
		1 Cube Pins.....	.10	7.95
Aug.	1.	1 Corset	5.00	
		1 Supporter ....	.50	
		1 pr. Supporters.	.25	
		1 Crimper .....	.15	5.90
	7.	1 Corset	1.50	
		1 Umbrella	2.00	3.50
	10.	1 pr. S. Gloves...		2.00
	15.	12 yds. Mull..... .15	1.80	
		4 sp. Silk..... .10	.40	

		1 sp. Cotton.....	.05	
		1 pkg. Needles...	.05	
		10 yds. Poplin... .15	1.50	
		10 yds. Poplin for	1.43	5.23
				<hr/>
				673.00
	16.	2 yds. Insertion... .10	.20	
		1½ yds. Lace for.	.16	
		½ yd. Medallions.	.55	
		2 Patterns ..... .15	.30	
		1 Delineator Sub.	1.00	2.21
	17.	2 bt. Insertion...1.20		2.40
	22.	1 Suit	2.75	
		1 Suit	2.00	4.75
	31.	1 Chemise .....	.75	.75
Sept.	15.	1 Cap .....	.75	
		1 Coat	3.50	4.25
Oct.	15.	3 pr. Hose for....	1.00	
		1 Waist	3.50	4.50
	24.	1 Waist		3.50
Nov.	1.	1 Waist		8.50
Dec.	12.	⅞ yd. Belting...1.00	.88	
		3 Gowns .....2.00	6.00	
	[53]			
		1 Hand Bag.....	3.50	
		1 pr. 1. Shoes....	4.00	
		1 pr. Boy's Shoes.	2.25	
		3 Shirts .....1.00	3.00	19.63
	14.	1 Satchel		11.00
	15.	1 White Waist...	8.50	
		1 White Waist...	5.00	

		1 White Waist...	5.00	
		1 White Waist...	3.50	22.00
April	26.	3 Sheets ..... .50	1.50	
		3 N. Shirts..... .50	1.50	3.00

759.49

LESS MERCHANDISE RETURNED.

Aug.	8.	1 pr. Oxfords....	3.50	
	11.	1 Skirt	8.50	
Nov.	7.	2 Boys' Suits...7.50	15.00	
	9.	1 Squirrel Collar.	6.50	
Dec.	16.	1 Corset	5.00	
	30.	1 Waist	5.00	
Jan.	20.	1 pr. Shoes.....	4.00	
Feb.	21.	1 Waist	3.50	
April	4.	1 Suit	22.00	
	6.	2 B. Suits.....8.50	17.00	
	6.	1 Boy's Suit....	7.50	
	6.	1 Boy's Suit.....	5.00	
	13.	1 Apron .....	.75	
	13.	1 Cap .....	.75	
	13.	1 Suit ...8.50 & 5.00	13.50	
	19.	2 Waists	9.00	
	20.	1 Hat10.00/8.00	18.00	
		1 Hat	7.50	

[54]

May	4.	2 Pattern Cloths.2.50	5.00	
	16.	1 dz. Hdkfs.....	2.85	
	16.	1 dz. "	1.50	

160.85

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	16.	1 Suit	22.00	
		1 Fancy Vest....	5.00	
June	2.	3 pr. Curtains...3.00	9.00	
		1 Corset	2.50	
July	31.	1 pr. Oxfords....	4.00	
August	7.	1 Corset	4.00	
		1 pr. Supporters.	.50	
Nov.	17.	1 Waist	3.50	
			<hr/>	
			212.35	
				212.35
				<hr/>
				547.14
1906.				
Feb.	26.	By cash	50.00	
			<hr/>	
				497.14

Issued June 18, 1907. [55]

Summons in Boggs & Buhl vs. Dunlevy.

The Commonwealth of Pennsylvania,
Allegheny County,—ss.

To the Sheriff of said County, Greeting:

We command you that you summon
[Seal] EFFIE J. DUNLEVY

so that she be and appear before our Court of
Common Pleas No. 4 to be holden at the City of
Pittsburgh, in and for said County, on the first Mon-
day of July next, there to answer

BOGGS & BUHL

of a Plea of Assumpsit.

And have you then and there this Writ.

Witness the Hon. Jos. M. Swearingen, President,

Judge of our said Court, the 18th day of June, A. D.
one thousand nine hundred and seven.

WM. B. KIRKER,
Prothonotary.

[Endorsed]: No. 777, Third Term, 1907. Boggs
& Buhl vs. Effie J. Dunlevy, Summons in Assumpsit
to first Monday of July, 1907.

WILLIS F. McCOOK,
Attorney for Plaintiff.

Shff. G.....2.00

M.....1.00

Served the within writ June 24th, 1907, on Effie J.
Dunlevy, defendant, by handing a true and attested
copy thereof to an adult member of her family at her
dwelling-house.

So Ans.

ADDISON C. GUMBERT,
Sheriff. [56]

No. 777—Third Term, 1907.

BOGGS & BUHL

vs.

EFFIE J. DUNLEVY.

**Praeipe for Judgment [in Boggs & Buhl v.
Dunlevy].**

To William B. Kirker,
Prothonotary.

Enter judgment in the above-entitled case in favor
of the plaintiff and against defendant in the sum of
\$537.76 for want of an appearance and affidavit of

60 *New York Life Insurance Company et al.*

Defense, sec. leg. et sec. reg., and liquidate as follows:

Real debt..... .\$497.14

Interest from Feb. 26, 1906, to

July 8th, 1907..... 40.62

\$537.76

WILLIS F. McCOOK,

Attorney for Plaintiff.

Filed July 8th, 1907. [57]

*Court of Common Pleas No. Four of Allegheny
County, Pa.*

No. 777—3d Term, 1907.

BOGGS & BUHL

vs.

EFFIE J. DUNLEVY.

**Praecipe for Appearance [in Boggs & Buhl vs.
Dunlevy].**

To W. B. Kirker, Esq.,

Prothonotary.

Enter my appearance for Boggs & Buhl, Plaintiff,
sec. reg.

S. H. HUSELTON,

Attorney for Plaintiff.

Nov. 10, 1909. [58]

*In the Court of Common Pleas No. Four of Allegheny
County, Penna.*

No. 253—First Term, 1910.

BOGGS & BUHL

vs.

EFFIE J. DUNLEVY.

Appearance Docket Entries [in Boggs & Buhl vs. Dunlevy].

Nov. 10, 1909.

Ex. Att. Sur. Judgment No. 777 Third Term, 1907, to 1st Monday, December, 1909, and summon New York Life Insurance Company and Joseph W. Gould as Garnishees. And now, Nov. 20, 1909, Rule granted on Plff. to show cause why rule requiring garnishee to answer should not be set aside, proceedings stayed "Writ executed Nov. 11, 1909, on F. W. Hubbard, Cashier New York Life Insurance Company and Joseph W. Gould, and Nihil Habet as to Deft." Dec. 27, 1909, on argument list and rule discharged and Garnishees allowed until Jan. 1, 1910, to answer. Dec. 28, 1909, Answer of Joseph W. Gould filed. Jan. 3, 1910, Answer of New York Life Insurance filed. Jan. 17, 1910, Rule *ex parte* Plff. for judgment on Garnishee. Answers reasons filed.

And now, Feb. 5, 1910, Rule granted on Effie J. Dunlevy, Jos. W. Gould and Boggs & Buhl, to show cause why this should not interplead together for the purpose of ascertaining to which of said parties the money in the hands of the New York Life Insurance Company belongs and why said Company should not be permitted when it is determined to whom the money ought to be paid, to pay said sum of Two Thousand four hundred seventy-nine and 70/100 (\$2479.70) Dollars into court for the benefit of such person as shall appear to be entitled thereto. And it appearing that Effie J. Dunlevy is a resident of the State of California, it is hereby ordered and decreed

that service of said rule, be by serving her personally with a copy of this petition and order, or by sending a copy of [59] same by mail or registered mail to her at her last known address. Returnable, Feb. 26, 1910. Feby. 19, 1910. Answer of Joseph W. Gould to rule filed. Feb. 26, 1910, Answer of Boggs & Buhl to rule filed, Mar. 1, 1910, Proof of service filed showing notice of rule to Interplead served on Plffs. Atty. Eo Die Afft. of service upon Effie J. Dunlevy of Notice, Petition and Order of Court filed, Mar. 3, 1910, on Argument List and Rule to interplead made absolute. Mar. 4, 1910, Rule for Judgment discharged. And now, Mar. 19, 1910, it is ordered, adjudged and decreed that the New York Life Insurance Co. be given leave to pay the sum of \$2479.70 into this court to abide the result of the issue to be framed by the Court. Eo Die leave is granted to the Lincoln National Bank to intervene and be made a party to the issue to be framed between the parties lawfully claiming the \$2479.70 heretofore paid into court by the New York Life Insurance Co., garnishee, atty. for Plff. being present and not objecting. Eo Die it is ordered that a Feigned Issue Eo Die Opinion filed. Mch. 21, 1910, Received of Gordon & Smith, attys. for New York Life Insurance Co. the sum of Twenty-Four Hundred Seventy-nine and 70/100 (\$2479.70) Dollars, less poundage on same, leaving the sum of Twenty-four Hundred Seventy One and no/100 (\$2471.00) Dollars, which sum I have deposited subject to the further order of Court.

WM. B. KIRKER, Pro.

F. I. No. 2 Second Term, 1910.

And now, May 3, 1910, it is ordered that the issue to be tried in this case shall be as follows, to wit, whether Joseph W. Gould made a valid gift of policy No. 305,011 issued to him by the New York Life Insurance Co. to Effie J. Gould, now Effie J. Dunlevy, All attaching creditors of said Effie J. Dunlevy, who desire to intervene in this proceeding are required to do so as plaintiffs herein on fifteen (15) days' notice to the attys. of record, and to file their statements of claim or demand within said period of [60] fifteen (15) days. And now, Oct. 1, 1910, it is ordered, adjudged, and decreed that Wm. B. Kirker, Pro., pay to Joseph W. Gould, or to his attorney, L. B. D. Reese, forthwith, the sum of \$2,471, that being the amount received by said Prothonotary from the New York Life Insurance Company Mar. 21, 1910, less his poundage, viz., \$8.70. by virtue of an order of this Court, date March 19, 1910, said money having been paid to said prothonotary by said Insurance Company and received by him in proceedings at No. 253 First Term, 1910, of this court. Oct. 3, 1910, Received of Wm. B. Kirker, Pro., the sum of Twenty-four Hundred Seventy-one and no/100 (\$2471.00) Dollars as per above order of Court.

L. B. D. REESE,

Atty. for Joseph W. Gould.

Attest: JOHN VOGT.

Feigned Issue No. 2 Second Term, 1910. [61]

C. P. No. 4, Alleg. Co. Pa.

No. 777—3d Term, 1907.

BOGGS & BUHL

vs.

EFFIE J. DUNLEVY.

**Prae. for Ex. Attachment [in Boggs & Buhl v.
Dunlevy].**

To W. B. Kirker, Esq.,
Pro.

Issue execution attachment against defendant in above-stated case and summon the New York Life Insurance Co. and Joseph W. Gould as Garnishees, sec. reg.

S. H. HUSELTON,
Atty. for Plff.

Nov. 10th, 1909. [62]

**Execution Attachment Sur Judgment [in Boggs &
Buhl vs. Dunlevy].**

Allegheny County,—ss.

The Commonwealth of Pennsylvania to the Sheriff
of Allegheny County, Greeting:

Whereas, Boggs & Buhl, lately before our Judges
of our Court of Common Pleas No. —, at
[Seal] Pittsburgh, to wit, On the 8th day of July,
A. D. 1907, by the Judgment of said Court
recovered against Effie J. Dunlevy (\$537.76), a
Judgment for the sum of Five Hundred Thirty-seven
and 76/100 Dollars, lawful money of the United
States, for debt, as also the sum of Fifty Dollars,
costs and charges, by it about its suit in that behalf

expended, whereof the said defendant duly convict, as appears to us of record. And

WHEREAS, It is alleged that the same judgment still remains due and unpaid to the said plaintiff, and that certain goods, chattels, moneys, and effects of the said defendant are in the hands or possession of New York Life Insurance Co. and Joseph W. Gould and liable to be Attached and Levied in satisfaction of the Judgment aforesaid. Now we command you, That you attach all and singular the debts due to said defendant, and deposits of money made by him and goods or chattels, pawned, pledged or demised by him in whose hands or possession soever the same may be found; and that you make known to the said New York Life Insurance Co. and Joseph W. Gould, as Garnishees and all other persons from whom such debts may be due, or in whose hands or possession such moneys, goods, or chattels, etc., may be found, that they may be and appear before our said Court, to be holden at Pittsburgh in and for said County, on the first Monday of December next, there to show cause why the Judgment aforesaid [63] should not be levied of the effects of said defendant in their hands agreeably to the Thirty-fifth Section of the Act of Assembly, passed the 16th day of June, 1836, relative to executions; and have you then and there this Writ.

WITNESS, the Hon. Jos. M. Swearingen, President of our said court, at Pittsburgh, the 10th day of Nov. A. D. one thousand nine hundred and nine.

WM. B. KIRKER,
Prothonotary.

[Endorsed]: No. 253 First Term. 1910. Boggs & Buhl vs. Effie J. Dunlevy. Execution Attachment Sur Judgment. No. 777—3d Term, 1907, to first Monday, December, 1909. S. H. Huselton, Plaintiff's Attorney.

Shff. G.3.80

M..... .50

Executed the within writ November 11th, 1909, by handing a true and attested copy thereof to F. W. Hubbard, Cashier, New York Life Insurance Company, making known to him the contents thereof; and on same date served Joseph W. Gould, by handing a like true and attested copy of the within writ to an adult member of his family at his dwelling-house; and at the same time summoning New York Life Insurance Company and Joseph W. Gould, as Garnishees, and after diligent search and inquiry and being unable to find Effie J. Dunlevy, defendant, named herein within my Bailiwick, do return Nihil Habet as to her.

So Ans.

ADDISON C. GUMBERT,
Sheriff. [64]

In the Court of Common Pleas No. Four of Allegheny County.

No. 253—First Term A. D. 1910.

BOGGS & BUHL

vs.

EFFIE J. DUNLEVY.

Execution Attachment.

And now, to wit, Nov. 11th, 1909, Rule on the Gar-

nishee Joseph W. Gould and New York Life Insurance Company to make full, true and direct answers, in writing, under oath or affirmation, to the interrogatories annexed hereto, on ten days' notice, or judgment, sec. reg.

S. H. HUSELTON,
Attorney for Plaintiff.

Interrogatories to Garnishees [in Boggs & Buhl vs. Dunlevy].

First Interrogatory—Do you know the defendant?

Second Interrogatory—State whether you have any Life Policy in which defendant is beneficiary or assignee or moneys, goods, bonds, notes or other evidence of indebtedness in your hands belonging to the said defendant. If any, state the kind and amount of said indebtedness?

Third Interrogatory—State whether or not, at the time of the service of the writ in this case on you there was any money in your hands due the said defendant, and how much? Also, state whether any money has since that, come into your hands, or has accrued to the said defendant?

Fourth Interrogatory—State whether or not, you owed the defendant any money, and if yea, the amount of the same, and when due, on policy of insurance of Joseph W. Gould in which defendant is beneficiary or assignee? [65]

[Endorsed]: Copy. No. 253—First Term, 1910. Boggs & Buhl, versus Effie J. Dunlevy. Interrogatories to New York Life Insurance Co., Joseph W. Gould, Garnishee. S. H. Huselton, Attorney for Plaintiff. [66]

*In the Court of Common Pleas No. Four of Allegheny
County.*

No. 253—First Term, 1910.

EXECUTION ATTACHMENT.

BOGGS & BUHL

vs.

EFFIE J. DUNLEVY.

**Rule to Show Cause and Affidavit [in Boggs & Buhl
vs. Dunlevy].**

To the Honorable, the Judges of said Court:

The petition of Joseph W. Gould, one of the Garnishees in the above-stated execution attachment, on behalf of himself and the New York Life Insurance Company, the other Garnishee named in said writ, respectfully represents:

That said writ was issued by the Prothonotary on the 10th day of November, 1909, and no return of said writ has yet been made by the Sheriff of said County.

That notwithstanding that no return has been made to said writ, the plaintiffs, on November 11th, 1909, ruled the Garnishees to answer Interrogatories in said execution attachment before the return of the writ of *scire facias* therein by the Sheriff.

WHEREFORE, petitioner prays your Honorable Court for a rule to show cause why the rule requiring the Garnishees to answer heretofore taken and served by the plaintiffs, should not be set aside; all proceed-

ings on said execution attachment to be stayed in the meantime.

And he will ever pray, etc.

JOSEPH W. GOULD. [67]

State of Pennsylvania,

County of Allegheny,—ss.

Joseph W. Gould, petitioner above named, being duly sworn according to law, deposes and says that the facts stated in the foregoing petition are true.

JOSEPH W. GOULD.

Sworn to and subscribed before me this 20 day of November, A. D. 1909.

WM. B. KIRKER,

Pro.

Order [Granting Rule to Show Cause in Boggs & Buhl vs. Dunlevy].

And now, to wit, November 20, 1909, the within petition presented in open court, and rule is granted as prayed for. Returnable sec. reg.

By the COURT.

Filed Nov. 20, 1909. [68]

[Appearance for Garnishees in Boggs & Buhl vs. Dunlevy.]

In the Court of Common Pleas No. Four of Allegheny County.

No. 253—First Term, 1910.

BOGGS & BUHL

vs.

EFFIE J. DUNLEVY.

70 *New York Life Insurance Company et al.*

Wm. B. Kirker, Esq.,

Pro.

Enter my appearance D. B. E. for Garnishees in
above stated case.

L. B. D. REESE.

Pittsburgh, November 20th, 1909.

Filed Nov. 20, 1909. [69]

*In the Court of Common Pleas No. Four of Allegheny
County, Pa.*

No. 253—First Term, 1910.

BOGGS & BUHL

vs.

EFFIE J. DUNLEVY.

**Praeipie for Appearance for N. Y. Life Ins. Co. [in
Boggs & Buhl vs. Dunlevy].**

Wm. B. Kirker, Esq.,

Prothonotary:

Enter our appearance in the above-entitled case
for New York Life Insurance Company, Garnishee.

GORDON & SMITH,

Attorneys for New York Life Insurance Company,
Garnishee.

Filed Dec. 6, 1909. [70]

*In the Court of Common Pleas No. Four of Allegheny
County, Penna.*

No. 253—First Term, 1910.

BOGGS & BUHL

vs.

EFFIE J. DUNLEVY,

Deft.,

JOSEPH W. GOULD et al., Garnishees.

**Praecipe for Appearance for Joseph W. Gould [in
Boggs & Buhl vs. Dunlevy].**

Wm. B. Kirker, Esq.,

Pro.

Enter my appearance for Joseph W. Gould, one of
the Garnishees in above-stated case.

L. B. D. REESE.

Filed Dec. 28, 1909. [71]

**[Answer of Joseph W. Gould to Interrogatories in
Boggs & Buhl vs. Dunlevy.]**

*In the Court of Common Pleas No. Four of Allegheny
County.*

No. 253—First Term, 1910.

EXECUTION ATTACHMENT.

BOGGS & BUHL

vs.

**EFFIE J. DUNLEVY, Defendant, JOSEPH W.
GOULD and NEW YORK LIFE INSUR-
ANCE CO., Garnishees.**

**ANSWER OF JOSEPH W. GOULD, ONE OF
THE GARNISHEES IN ABOVE STATED
CASE TO INTERROGATORIES SERVED
ON HIM.**

Answer to First Interrogatory: I know the defend-
ant.

Answer to Second Interrogatory: I have no life in-
surance policy in which defendant is beneficiary or
assignee, or moneys, goods, bonds, notes or other evi-
dence of indebtedness in my hands belonging to the

said defendant, except that the said defendant now occupies the relation or position of assignee in a life insurance policy on my life under the following circumstances: On the 24th day of January, 1889, the New York Life Insurance Company issued on my life their policy No. 305,011 in the sum of \$5,000, wherein said company agreed to pay to my executors, administrators or assigns the sum of \$5,000 upon receipt and approval at said office of proofs of my death during the continuance of said policy, after deducting therefrom all indebtedness to said company together with any balance of premiums remaining unpaid, and with the surrender of said policy. On or about June 27th, 1893, being desirous of assigning said policy conditionally to my daughter Effie J. Gould, now intermarried with R. M. Dunlevy, I called at the office of the New York Life Insurance Company and requested R. H. McCreary, the agent in charge of said office, to have said policy assigned to my daughter the said Effie J. Gould, on condition that I should die before said policy was paid up in full, desiring to reserve to myself the right to collect any money to be paid on said policy at the maturity thereof if I should [72] so long live. The agent of said company had said assignment prepared and I signed the same on his assertions that it was an assignment to my said daughter of the said policy only on the condition that I should die before the maturity of said policy or before all the premiums were paid thereon. I did not read the assignment before executing the same relying on the statement of the said McCreary, the agent of said company, that I was assigning it

conditionally in the manner hereinbefore stated.

I had no intention of making an absolute assignment of said policy, such as now appears to have been made, to my daughter Effie J. Dunlevy, or to any other person.

The said policy was never delivered to the said Effie J. Gould (now Dunlevy), to whom it was assigned, but has always been and is now in my possession and I have paid all premiums maturing on said policy since said assignment, and at maturity, supposed I would have no difficulty in collecting the amount of the surrender value of said policy but was met with said assignment.

On August 20th, 1909, through my attorney, L. B. D. Reese, I notified the said New York Life Insurance Company not to pay any moneys due thereon unto the said Effie J. Gould or to any person representing her; and soon thereafter I notified said company by letter to pay no moneys due or to become due on said policy to the said Effie J. Gould or to any person representing her, and I deny that the said Effie J. Gould has any interest in said policy, and aver that whatever there is due thereon belongs to me and not to the said Effie J. Gould.

I would not have executed said assignment had I not been informed by McCreary, the agent of said company, that I was making a conditional assignment of said policy, that the same was to be effective in case of my death before the maturity thereof, and to be void in case I should be living at the time said policy should [73] be paid up.

Answer to Third Interrogatory: At the time of the

service of the above writ on me, I had no money in my hands due the said defendant and no money has since that time come into my hands or accrued to the said defendant.

Answer to Fourth Interrogatory: I have never owed the defendant any money on a policy of insurance on my life in which the defendant occupies the relation of assignee, except as stated in my answer to the second interrogatory.

J. W. GOULD.

State of Pennsylvania,
County of Allegheny,—ss.

Joseph W. Gould, being duly sworn according to law, deposes and says that the facts stated in the foregoing answers are true.

J. W. GOULD.

Sworn to and subscribed before me this 27th day of December, 1909.

[Seal]

ALICE E. DUFF,
Notary Public.

My commission expires Jan. 21, 1911.

Filed Dec. 28, 1909. [74]

[Answer of N. Y. Life Ins. Co. to Interrogatories in
Boggs & Buhl vs. Dunlevy.]

Fol. 1 *In the Court of Common Pleas Number
Four of Allegheny County.*

No. 253—1st Term, A. D. 1910.

BOGGS & BUHL,

Plaintiffs,

—against—

EFFIE J. DUNLEVY,

Defendant.

ANSWER OF GARNISHEE.

New York Life Insurance Company, as garnishee
Fol. 2 herein, answers the interrogatories filed by
plaintiffs as follows:

To the first interrogatory said garnishee answers
that it does not know defendant except through cor-
respondence had with her in connection with policy
No. 305,011 written by said garnishee on the life of
one Joseph W. Gould.

To the second interrogatory said garnishee answers
that said defendant claims an interest in said policy
No. 305,011 as assignee but that said garnishee is un-
certain as to what are the rights of said defendant in
Fol. 3 said policy by reason of the following facts,
to wit: That on or about the 24th day of January,
1889, said garnishee duly entered into a contract with
said Joseph W. Gould of Pittsburgh, Pennsylvania,
as evidenced by its policy No. 305,011 there and then
duly made and delivered to said Joseph W. Gould by
the terms of which said garnishee undertook to and

did insure the life of said Joseph W. Gould for the sum of Five Thousand Dollars (\$5,000.00) payable at the Home Office of said garnishee in the City of New York to said insured's executors, administrators

Fol. 4 or assigns, upon receipt and approval at said Home Office, of proofs as thereafter required of the death, during the continuance of said policy, of said insured. That said policy was written on the ordinary life non-forfeiting limited tontine plan and further [75] provided that if said insured should be living at the completion of the tontine period thereunder, namely, on the 22d day of January, 1909, and said policy should then be in force, said insured would be entitled to a choice of certain benefits therein stated, it being understood and agreed that

Fol. 5 not less than three months prior to the termination of said tontine period said insured should notify said garnishee in writing which benefit was selected and if no such notification should be received then the accumulated surplus should be applied to the purchase of an annuity in one of the forms stipulated in the "First Benefit" named therein. A full, true and correct copy of said policy is hereto annexed marked Exhibit "A" and made a part hereof as though here set forth at length.

On or about the 30th day of June, 1893, said garnishee received at its Home Office a written instrument purporting to be signed by said insured and dated and acknowledged the 27th day of June, 1893, a full, true and correct copy of which is hereto annexed marked Exhibit "B" and made a part hereof as though here set forth at length. Said

Fol. 6

garnishee is informed and believes that the Effie J. Gould named in said instrument is one and the same person as said defendant Effie J. Dunlevy. Said policy provided that under no circumstances would said garnishee assume any responsibility for the validity of any assignment thereof, and said garnishee insists upon adhering to said provisions of said policy.

Fol. 7 On or about the 10th day of December, 1908, said garnishee mailed to said insured and to said defendant a statement of the settlements from which selection of option was to be made in accordance with the provisions of said policy if it should be in force at the end of said tontine period and said insured should then be living, a full, true and correct copy of which statement is hereto annexed marked Exhibit "C," and made a part hereof as though here set forth at length. Said tontine period under Fol. 8 said policy was [76] completed on said 22d day of January, 1909, said policy being then in force and said insured being then alive, as said plaintiff is informed and believes, but no selection of any of the settlements set forth in said statement was received by said garnishee prior thereto.

On or about the 16th day of February, 1909, said garnishee received a letter purporting to be signed by said insured and bearing date the 12th day of February, 1909, a full, true and correct copy of which is hereto annexed marked Exhibit "D," and made a part hereof as though here set forth at length.

Fol. 9 Thereafter and on the 3d day of March, 1909, said garnishee sent to its Pittsburgh Branch

Office a check for the cash surrender value of said policy No. 305,011, amounting to Twenty-four Hundred and Seventy-nine Dollars and Seventy Cents (\$2479.70) to the order of said Effie J. Gould as assignee, with instructions to deliver the same upon the signing by said Effie J. Gould, as assignee of said garnishee's regular termination receipt and the delivery by her of the original of said policy and duplicate of said written instrument above referred to, marked Exhibit "B," and the signing by her of a selection of option to withdraw said cash surrender value of said policy.

Fol. 10 On or about the first day of June, 1909, said garnishee received a letter purporting to be signed by said Effie J. Gould Dunlevy and dated the 27th day of May, 1909, a full, true and correct copy of which letter is hereto annexed marked Exhibit "B," and made a part hereof as though here set forth at length. A full, true and correct copy of the enclosure referred to in said letter is hereto annexed marked Exhibit "F" and made a part hereof as though here set forth at length. Thereafter and on,

Fol. 11 to wit, the 10th day of June, 1909, said garnishee recalled said check from its Pittsburg Branch Office to be held by said garnishee at its Home Office until the title to said policy should be cleared up and on the same date said garnishee wrote a letter to said Effie J. Gould [77] Dunlevy, a full, true and correct copy of which letter is hereto annexed marked Exhibit "G" and made a part hereof as though here set forth at length. Thereafter and on or about the 29th day of June, 1909, said garnishee re-

ceived a letter purporting to be signed by said Effie J. Gould Dunlevy and dated the 23d day of Fol. 12 June, 1909, a full, true and correct copy of which letter is hereto annexed marked Exhibit "H" and made a part hereof as though here set forth at length. Said garnishee replied to said letter on the 22d day of July, 1909, and a full, true and correct copy of said reply is hereto annexed marked Exhibit "I" and made a part hereof as though here set forth at length.

Thereafter and on or about the 21st day of Fol. 13 August, 1909, said garnishee received a letter dated the 20th day of August, 1909, and signed by one L. B. D. Reese, as attorney for said Joseph Gould, a full, true and correct copy of which letter is hereto annexed marked Exhibit "J" and made a part hereof as though here set forth at length. Said garnishee replied to said letter under date of August 30th, 1909, and a full, true and correct copy of said reply is hereto annexed marked Exhibit "K" and made a part hereof as though here set forth at length.

On or about the 28th day of August, 1909, said Fol. 14 garnishee received a letter purporting to be signed by said Effie J. Gould Dunlevy and dated the 23d day of August, 1909, a full, true and correct copy of which letter is hereto annexed marked Exhibit "L" and made a part hereof as though here set forth at length. On or about the 30th day of August, 1909, said garnishee replied to said letter and a full, true and correct copy of said reply is hereto annexed marked Exhibit "M" and

made a part hereof as though here set forth at length. Thereafter and on or about the 9th day of September, 1909, said garnishee received a letter
Fol. 15 from said L. B. D. Reese, as attorney for said insured, dated the 3d day of September, 1909, a full, true and correct copy of which is hereto annexed [78] marked Exhibit "N," and made a part hereof as though here set forth at length. Thereafter and on or about the 11th day of September, 1909, said garnishee received a letter purporting to be signed by said insured dated the 8th day of September, 1909, a full, true and correct copy of which letter is hereto annexed marked Exhibit "O," and made a part hereof as though here set forth at length. Thereafter and on or about the 13th day of October, 1909, said garnishee received a letter from
Fol. 16 one Lee D. Windrem, as attorney for said Effie J. Gould Dunlevy and dated the 6th day of October, 1909, a full, true and correct copy of which letter is hereto annexed marked Exhibit "P" and made a part hereof as though here set forth at length. Thereafter and on or about the 25th day of October, 1909, said garnishee replied to said letter, a full, true and correct copy of which reply is hereto attached marked Exhibit "Q," and made a part hereof as though here set forth at length.

Fol. 17 Said garnishee says that by reason of the facts above set forth it cannot without hazard to itself determine as to what are the respective rights of said defendant and said insured in and to said policy of insurance.

To the third interrogatory said garnishee answers

that it refers to its answer to the second interrogatory herein and makes the same a part hereof.

To the fourth interrogatory said garnishee answers that it refers to its answer to the second interrogatory herein and makes the same as part hereof.

WHEREFORE, said garnishee having fully answered Fol. 18 prays that it may be duly advised as to its rights and duties in the premises and that upon its discharge it may be allowed a reasonable sum for its costs and disbursements.

NEW YORK LIFE INSURANCE COMPANY.

By SEYMOUR M. BALLARD,

Secretary. [79]

State of New York,

County of New York,—ss.

Seymour M. Ballard, being duly sworn, deposes and says that he is Secretary of the New York Life Insurance Company, the garnishee herein; that said corporation is duly organized and existing under and by virtue of the laws of the State of New York; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

SEYMOUR M. BALLARD.

Subscribed in my presence and sworn to before me this 23 day of November, 1909.

[Seal]

LOUIS H. COOKE,

Notary Public No. 197, New York Co., N. Y.

My Commission expires March 30th, 1910. [80]

[Exhibits "A"—"Q" to Answer of N. Y. Life Ins.
Co. to Interrogatories in Boggs & Buhl vs.
Dunlevy.]

No. 305,011.

NEW YORK LIFE INSURANCE COMPANY.

Assurance on the Life of

J. W. Gould

Amount, \$5000.

For the information of the assured,
and in order that any unintentional
errors or omissions which hereafter
may be found to exist may be corrected,
an abstract of the application upon
which this Policy is based may be
found on third page within.

If corrections are desired, when
satisfactory to the Company, a Certifi-
cate to that effect will be issued over the
signature of the President or Actuary.

L. C. V. & CO.,

Agent.

The De Vinne Press. [81]

SINGLE PREMIUMS,
TO SECURE \$1,000.
Payable at Death.

Age.		Age.	
25	\$356.46	50	\$645.05
26	363.34	51	662.54
27	370.50	52	680.43
28	377.98	53	698.72
29	385.78	54	717.38
30	393.91	55	736.38
31	402.39	56	755.70
32	411.23	57	775.29
33	420.44	58	795.14
34	430.03	59	815.22
35	440.02	60	827.35
36	450.44	61	834.83
37	461.27	62	841.66
38	472.54	63	847.31
39	484.24	64	853.37
40	496.41	65	859.81
41	509.05	66	866.69
42	522.17	67	873.98
43	535.78	68	881.65
44	549.90	69	889.70
45	564.51	70	898.11
46	579.64	..	.....
47	595.27	..	.....
48	611.39	..	.....
49	628.00	..	.....

Number	Amount
305,011	\$5,000

THE
NEW YORK
LIFE INSURANCE COMPANY.
BY THIS POLICY OF INSURANCE,

In consideration of the agreements, statements, representations and warranties submitted to its officers at the Home Office, in the City of New York, in the written Application for this Policy, which are hereby referred to and made a part of this Contract, and in further consideration of the sum of One Hundred and Forty Dollars and Eighty-five Cents, to them in hand paid, at the Office of the Company, in the City of New York, and for the annual payment of One Hundred and Forty Dollars and Eighty-five Cents, to be made at said Office on or before the Twenty-fourth day of January, in every year during the continuance of this Policy,

DOTH INSURE the life of Joseph W. Gould—Shipper of Coal—of Pittsburgh—in the County of Allegheny—State of Pennsylvania—(hereinafter called the insured), in the amount of Five Thousand Dollars, commencing on the Twenty-fourth day of January, 1889, at noon.

AND THE SAID COMPANY DOTH HEREBY PROMISE AND AGREE to pay the amount of the said Insurance, at its Office in the City of New York, to the insured's Executors, Administrators or Assigns, upon receipt and approval at said office of proofs, as hereinafter required, of the death, during

Age
37.

Annual
Premium.
\$140.85.

the continuance of this Policy, of the said insured, deducting therefrom all indebtedness to the Company, together with any balance of the year's premium remaining unpaid.

THIS POLICY is issued and accepted upon the following express Conditions and Agreements:
[83]

First: That if the premiums are not paid, as hereinafter provided, on or before the days when due, then this Policy shall become void, and all payments previously made shall be forfeited to the Company, except that (as provided by Act of May 21, 1879, Chap. 47, Laws of 1879 of the State of New York) if this Policy, after being in force three full years, shall lapse or become forfeited for the non-payment of any premium, a paid-up Policy will be issued, on demand made within six months after such lapse with surrender of this Policy, under the same conditions as this Policy, except as to the payment of premiums, but without participation in profits, for such an amount as the net Reserve on this Policy at the time of lapse, computed by the American Table of Mortality and interest at four and one-half per cent, after deducting all indebtedness to the Company, will purchase as a single premium at the present published rates of the Company, at the age of the insured at the time of lapse; and all right, claim or interest to or in any other paid-up Policy or surrender value, and to or in any temporary insurance, whether or not required or provided for by any statute, is hereby expressly waived and relinquished.

Examined,
M

Second: That the provisions, requirements and benefits, printed or written by the Company, upon the next page of this Policy, are a part of this Contract, as fully as if they were recited at length over the signatures hereto affixed.

IN WITNESS WHEREOF, the said NEW YORK LIFE INSURANCE COMPANY has, by its President and Vice-president or Actuary, signed and delivered this Contract, this Twenty-fourth day of January, one thousand eight hundred and eighty-nine.

WM. W. BEERS, President.

RUFUS W. WEEKS, Actuary.

[84]

134a.

PROVISIONS, REQUIREMENTS AND BENEFITS REFERRED TO IN THIS POLICY.

This Policy is issued on the NON-FORFEITING LIMITED-TONTINE POLICY PLAN, and particulars of which are as follows:

That the TONTINE DIVIDEND PERIOD for this Policy shall be completed on the 24th day of January in the year Nineteen hundred and nine.

That no dividend shall be allowed or paid upon this Policy, unless the insured shall survive until completion of its TONTINE DIVIDEND PERIOD, and unless this Policy shall then be in force.

That surplus or profits derived from such Policies on the NON-FORFEITING LIMITED-TONTNE POLICY PLAN as shall not be in force at the date of the completion of their respective TONTINE DIVIDEND PERIODS, shall be apportioned among such Policies as shall complete their TONTINE DIVIDEND PERIODS.

Ordinary
Life
Non forfeit-
ing Limited-
Tontine
Policy.
N.
38-62.

Non-forfeit-
ing Limited-
Tontine
Policy
Provisions.

That after the completion of the TONTINE DIVIDEND PERIOD, provided this Policy shall not have been previously terminated, this Policy shall secure to the insured one of the following benefits: First—to apply the accumulated dividend to the purchase of an Annuity on the life of the said insured in one of the following forms: a, an Annuity for the number of years that premiums are payable beyond the TONTINE PERIOD, to be used in reduction of subsequent premiums on this Policy, and in case the amount accruing in any year from the Annuity together with dividends that may thereafter be declared on this Policy, shall exceed the amount of premium due thereon, the excess to be paid in cash; or b, if the [85] payment of premiums is completed, an Annuity for the whole term of life. Second—to continue the Policy for the original amount and withdraw the accumulated surplus apportioned by the Company to this Policy in cash. Third—to withdraw in cash the entire Equity (that is, the net reserve computed by the American Table of Mortality and interest at four and one-half per cent, and in addition thereto the accumulated surplus aforesaid). Fourth—to convert the entire Equity into a paid-up Policy, without participation in profits, for an amount to be determined by the method then in use by the Company in determining Paid-up policies of this class; provided that should the amount of such paid-up Policy exceed the original amount of the insurance, it is made a condition precedent to its issue: 1st, that a medical examination of the insured, made by an approved

examiner upon the blank provided by the Company for that purpose, is furnished by the applicant at his own expense; 2d, that such medical examination is approved by the medical board at the Home Office of the Company, and the risk is recommended by them; and 3d, that this policy is legally surrendered during the life-time of the insured, and within ninety days from the termination of the TONTINE DIVIDEND PERIOD. Fifth—the conversion of the entire Equity into a life annuity, upon the life of and payable to the said insured. These benefits are at the option of the insured, but it is understood and agreed that not less than three months prior to the termination of the TONTINE PERIOD, the said insured shall notify the Company, in writing, which benefit is selected and if no such notification shall be received, then, and in that case, the accumulated surplus shall be applied to the purchase of an Annuity in one of the forms stipulated in the “first benefit” named above. [86]

That in the payment of premiums upon this Policy, falling due within the selected TONTINE PERIOD, a grace shall be allowed of one month; provided that in all cases when this grace is availed of, a fine at the rate of Ten per cent per annum shall be paid to the Company for the time deferred.

Limit of
Travel and
Residence.

If the insured shall travel or reside beyond the settled limits or the protection of the Government of the United States (excepting in the settled limits of the Dominion of Canada, Prince Edward Island, or Newfoundland); or, between the first day of July and the first day of November, south of a line

beginning at the point of intersection of the northerly boundary of North Carolina with the Atlantic Coast; thence running westerly along the said northerly boundary to a point one hundred miles from the Coast; thence in a southwesterly direction, continuing one hundred miles from said Coast to the thirty-fourth parallel of latitude; thence westerly along said parallel to the westerly border of Alabama (excepting the City of Atlanta and an area within a radius of fifty miles around it); thence northerly along the westerly border of Alabama and along the Tennessee River to the northerly boundary of Tennessee; thence westerly along the northerly boundary of Tennessee and Arkansas, extended to the ninety-seventh degree of west longitude; thence southerly to the thirty-second parallel of north latitude; thence westerly along the said parallel to the Pacific Ocean; or shall enter upon a voyage upon the high seas (except as hereinafter specified); or shall be personally engaged in blasting, mining, submarine operations, aeronautic travel or excursions, or the manufacture or transportation of highly inflammable or explosive substances; or in working or managing a steam-engine in any capacity; or as mariner, engineer, fireman, conductor, express messenger, or [87] laborer in any capacity upon service on any sea, sound, inlet, river, lake, or railroad; or shall enter any military or naval or paid first department service whatsoever (the militia, when not in actual service, excepted), without the consent of this Company in each or either of the foregoing cases previously given in writing; or if he shall die

Occupations
and Em-
ployments.

Dueling.
Violation of
Law, etc.

in, or in consequence of a duel, or the violation of the laws of any nation, state, or province; or if death shall be caused by or in consequence of the use of intoxicating drink, opium, or other narcotics; or if the first premium herein shall not have been actually paid during the continuance of the life in the same condition of health as described in the application; or if any of the statements or representations made in the application for this Policy shall be found in any respect untrue; then, and in every such case, this Policy shall be null and void, and all payments previously made shall be forfeited to the Company, and no action or right of action shall remain to, or be maintained against this Company by, the assured or any other person, by virtue of this Policy.

Traveling
Privileges.

The insured has permission to pass as passenger, by direct route, in first-class vessels, as follows: 1st—to and from Europe (travel and residence wherein is hereby permitted); 2d—to and from California, and along the coasts of Nova Scotia, New Brunswick, and the United States, between Cape Canso and the Rio Grande (provided no part is entered in which residence, at the time of such entrance, is prohibited); 3d—between ports on the East Pacific Coast, north of 32° of north latitude; 4th—between ports on the East Pacific Coast, north of 32° of north latitude, and ports in the Sandwich Islands, China, and Japan. [88]

Powers of
Agent.

No agent has power in behalf of the Company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, to issue a permit for residence, travel,

or occupation, or to bind the Company by making any promise or receiving any representation or information. This power can be exercised only by the President, Vice-president, or Actuary of the Company, and will not be delegated.

All premiums are due and payable at the Home Office of the Company unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the President, Vice-president, or Actuary, and countersigned by such agents. Notice that each and every payment of premium is due at the date named in the Policy is given and accepted by the delivery and acceptance of this Policy, and any further notice required by any statute is hereby expressly waived. The giving of any other notice, or the acceptance of any premium after it is due, is to be considered as an act of courtesy only and shall not be deemed as establishing a custom or as waiving or disturbing any of the conditions as to payment of premiums thereafter due.

Payment of
Premiums.

Notice
When Due.

Proofs of death under this Policy shall be furnished to the Company at its office in the City of New York within one year after death, and shall include sworn statements on the Company's forms, as follows: (1) a statement from each claimant; (2) a statement from each physician who attended the deceased within a year before death; (3) a statement from a responsible householder who knew the deceased; (4) a statement from the undertaker; (5) a statement from the clergyman, whenever one officiates; (6) a copy of the verdict and of the evidence on which it was based, duly certified, whenever an

Proofs of
Death.

inquest has been held. All questions must be fully answered, and the omission of any of the answers or statements required must be [89] satisfactorily explained or supplied by other proofs.

Assignments.

Any assignment of this Policy must be made in duplicate, and both copies must be sent to the Home Office for acknowledgment, one of them to be retained by the Company. Under no circumstances will the Company assume any responsibility for the validity of any assignment. [90]

ABSTRACT (E. & O. E.) OF THE APPLICATION
FOR INSURANCE IN THE NEW YORK
LIFE INSURANCE COMPANY.

Policy No.

1. Name (in full) of the person applying for insurance on his life: Joseph W. Gould.
2. A. Present residence: Pittsburgh, County of Allegheny, State of Pa.
B. Post-office Address: 17412 3d Avenue, Pittsburgh, Pa.
3. Occupation or Employment; if more than one, state all: Coal Business and River Captain.

Note.—It is not a sufficient answer to state (for example) “Merchant,” “Mechanic,” “Salesman,” or “Clerk.” The particular branch of business or trade is to be specified, and full particulars given, especially where the occupation is in any way hazardous.

4. A. How long have you been engaged in present occupation? A. 4 years.
B. Are you married? B. Yes.
5. A. Place of Birth? McKeesport, Pa.
B. Race or Nationality? White.
C. Born on 7th day of Febry., 1852.
D. Age nearest Birthday: 37.
6. A. Are your habits at the present time, and have they always been, sober and temperate? Yes.
B. To what extent do you use intoxicating drinks as a beverage? B. Very rarely drink anything.
C. Are you now engaged in any way in the retailing of alcoholic liquors? C. No.
D. Have you ever been so engaged? D. No.

[91]

7. A. Are you now insured in this Company, or have you ever been? A. No.
B. If so, state Numbers of Policies and amounts. B. ———
8. A. Have you any other insurance on your life? A. No.
B. If so, state in what companies, when taken, the kinds of policies, and their respective amounts. B. ———
9. A. Has any proposal or application to insure your life ever been made to any company or agent, upon which a policy has not been issued, or upon which a policy has been issued at a higher rate than that applied for? A. No.

94 *New York Life Insurance Company et al.*

B. If so, state full particulars, to what company, when, &c. B. ———

10. Where have you resided (during summer and winter) during each of the last ten years? In Pennsylvania.

11. A. Name of an intimate friend: T. J. Wood.

B. His P. O. Address: Pittsburgh.

12. Sum to be insured: \$5000.

(Annually,

PREMIUM— (~~Semi-annually~~

How payable (~~or Quarterly.~~

On what table?

Ordinary Life.

~~Life Premiums.~~

~~Endowment, -- payable in years.~~
~~-- Premiums.~~

NOTE.—Strike out the rates not desired.

13. A. Do you desire a policy on the “Nonforfeiting Limited-Tontine Policy” plan, as set forth in that policy form? (Yes or No.) A. Yes.

B. If so, which Tontine Period do you select?

B. I select the 20 year Tontine Period.

14. A. To whom is the insurance applied for to be payable in event of death? (GIVE NAME IN FULL.) A. ———.

B. Present residence? B. My estate.

C. What relation to you? C. ——— [92]

15. If the application is for an Endowment Policy, to whom is the Endowment to be payable at its maturity?

Note.—This question refers only to policies issued on the Endowment premium-tables, not to policies issued on any Life table (even if Tontine).

16. Any policy issued under this application will contain an agreement that:

If it shall lapse or become forfeited for the nonpayment of any premium after being in force three full years, a paid-up policy will be issued on demand, made within six months after such lapse with surrender of the policy, under the same conditions as this policy, except as to the payment of premiums, but without participation in profits for such an amount as the net reserve on the policy at the time of lapse, computed by American Table of Mortality and interest at four and one-half per cent, after deducting all indebtedness to the Company, will purchase as a single premium at the present published rates of the Company, at the age of the insured at the time of lapse, if an Ordinary Life Policy, or for such an amount as shall be represented by as many proportional parts of the sum insured as there shall have been complete annual premiums paid thereon when the lapse or default above referred to shall first be made,

if a Limited Payment Life Policy or an Endowment Policy.

In consideration of this agreement, do you specifically waive and relinquish all right, claim or interest to or in any temporary insurance, surrender-value, or other paid-up policy, whether or not required or provided for by any statute? Yes. [93]

Note.—An affirmative answer to this question is a necessary condition to the issue of the Policy.

I DO HEREBY AGREE as follows: 1. That the statements and representations contained in the foregoing application, together with those made to the Medical Examiner by me, shall be the basis of the contract between me and The New York Life Insurance Company; that I hereby warrant the same to be full, complete and true, whether written by my own hand or not, and that if the same or any of them are in any respect untrue, the policy which may be issued hereon shall be void, and all moneys which may have been paid on account of such insurance shall belong to said Company. 2. That, inasmuch as only the officers at the Home Office of said Company, in the City of New York, have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations, or information made or given by or to the person soliciting or taking this application for a policy or by or to any other person, shall be binding on said Company, or in any manner affect its

rights, unless such statements, representations, or information be reduced to writing, and presented to the officers of said Company, at the Home Office, in this application. 3. That in any distribution or surplus or profits, the principles and methods which may be adopted by said Company for such distribution, and its determination of the amount equitably belonging to any policy which may be issued under this application, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under such [94] policy. 4. That any policy which may be issued under this application shall not be in force until the actual payment to, and acceptance of the premium by said Company, or its authorized agent, during my life-time and good health. 5. That the contract, contained in such policy and in this application, shall be construed according to the law of the State of New York, the place of said contract being agreed to be the Home Office of said Company in the City of New York. 6. That no suit shall be brought against said Company under said contract after the lapse of one year from the time when the cause of action accrues.

Dated at Pittsburgh this 8th day of Oct., 1888.

Signature of the person applying for insurance on his life. (Write the name in full.)

JOSEPH W. GOULD.

Witness, _____.

Agent, _____. [95]

DECLARATIONS MADE TO THE MEDICAL EXAMINER OF THE NEW YORK LIFE INSURANCE COMPANY.

The Applicant for Insurance must answer the following Questions, which will be asked him by the Medical Examiner; the Answers form an essential part of the Contract.

1. Have you had, since childhood, any of the following complaints? Answer (Yes or No) opposite each.

Apoplexy,	No
Asthma,	No
Bilious Colic,	No
Bronchitis,	No
Cancer,	No
Dropsy,	No
Disease of Brain,	No
Disease of Heart,	No
Disease of Kidneys,	No
Disease of Liver,	No
Disease of Lungs,	No
Disease of Urinary Organs,	No
Fistula,	No
Fits or Convulsions,	No
General Debility,	No
Gout,	No
Insanity,	No
Jaundice,	No
Palpitation,	No
Paralysis,	No
Piles,	No

Pleurisy,	No	
Pneumonia	No	[96]
Rheumatism	No	
Rupture,	No	
Scrofula,	No	
Smallpox,	No	
Skin Disease,	No	
Spinal Disease,	No	
Spitting or Raising Blood,	No	
Syphilis,	No	
Yellow Fever,	No	

Give full particulars of any illness you may have had since childhood.

Typhoid fever when 19 years old—2 months sick
Good recovery.

When were you last confined to the house by illness? As stated above.

2. Have you ever had severe headaches, vertigo, fits or any nervous or muscular trouble?

3. A. Are you subject to cough, expectoration, palpitation, or difficulty of breathing? A. No.

B. Have you ever been? If so, to which, when, and full details. B. No.

4. Are you subject or predisposed to Dyspepsia, Dysentery, or Diarrhoea?

5. Have you ever met with any accidental or serious personal injury? No.

6. Have you ever been seriously ill? If so, when, with what, and who was the medical attendant?

(State his name and residence.) No. Except with the typhoid fever. Dr. M. Knox, McKeesport, Pennsylvania.

7. A. Name and address of your usual medical attendant.

A. Dr. J. R. McCord, Pittsburgh, Pa.

B. When and for what have his services been required? B. [97]

8. Have you consulted any other medical man? If so, when, and for what? No.

9. Has any proposal or application to insure your life ever been made to any company or agent upon which a policy has not been issued? If so, state full particulars: No.

10. Has any physician given an unfavorable opinion upon your life with reference to Life Insurance? If so, state particulars: No.

11. The Medical Examiner will please obtain from the party answers in full detail to the following queries. (In giving cause of death avoid all indefinite terms, as "General Debility," "Change of Life," "Fever," "Dropsy," "Exposure," or "Accident." If the word "Childbirth" is used, state how long after the delivery death occurred, and whether there were any symptoms of disease of the lungs.)

	Age (If Living).	Condition of Health.	Age at Death.	Cause of Death.	How long Ill.	Previous Health.
Father	67	Good				
Mother			40	Consump- tion	2 or 3 years	Good
2 Brothers	38	Good				
2 ½	23	"				
	18, 20	"				
3 Sisters	42	"	30	Don't know	One Year	Good—had no cough
1 ½	25	"		cause Dropsy		
	19	"		Don't know		
Father's Father,			Abt. 70		Don't know	Good
Father's Mother,			Don't know	"	"	Don't know
Mother's Father,			"	"	"	" "
Mother's Mother,			"	"	"	" "

12. A. Has either of your parents, brothers, sisters, grandparents, uncles or aunts now, or ever had consumption, cancer, gout, scrofula, diabetes, rheumatism, epilepsy, insanity, or other hereditary disease?

A. Mother died of consumption.

B. If so, give full particulars of each case.

B.

I HEREBY DECLARE that I am the person who has made and signed the accompanying application for insurance in the New York Life Insurance Company, dated Oct. 8, 1888; that I am temperate in my habits and am, to the best of my knowledge and belief, in sound physical condition and a proper subject for life insurance.

JOSEPH W. GOULD.

88-42

G. E. [99]

[Exhibit "B" to Answer to Interrogatories in
Boggs & Buhl vs. Dunlevy—Assignment and
Transfer.]

For Value Received I hereby assign and transfer unto Effie J. Gould of Pittsburgh, Pa., the Policy of Insurance known as No. 305011, issued by the

NEW YORK LIFE INSURANCE COMPANY,
upon the life of Joseph W. Gould, of Pittsburg Pa and all dividend, benefit, and advantage to be had or derived therefrom, subject to, the conditions of said Policy, and to the Rules and Regulations of the Company.

Witness my hand and seal, this 27th day of June one thousand eight hundred and *nine-three*.

S. JOSEPH W. GOULD.

State of Pennsylvania

County of Allegheny,—ss.

On this 27th day of June, 1893, before me personally came Joseph W. Gould, to me known to be the individual described in and who executed the foregoing assignment, and acknowledged that he executed the same.

HENRY C. LYON,
Notary Public.

The NEW YORK LIFE INSURANCE COMPANY, in accordance with its rules, as stated below, has retained the duplicate of this assignment.

JOHN A. McCALL, Pres.,
per LAWES.

New York, June 30th, 1893.

NOTICE.—The rules of the Company require that Assignments of Policies issued by it shall be made in duplicate; that both copies shall be sent to the Home Office; and that one copy shall be *retained by the Company and the other returned*; [100]

The Company has no responsibility for the validity of any assignment.

The acknowledgment must be made before an officer duly authorized to administer oaths, and his authority and the genuineness of his signature must be attested by the Clerk of a Court of Record, under his official seal.

Exhibit B. [101]

[Exhibit "C" to Answer to Interrogatories in
Boggs & Buhl vs. Dunlevy—Letter, December
10, 1908, Weeks to Gould.]

NEW YORK LIFE INSURANCE COMPANY,
346 & 348 Broadway, New York.
DARWIN P. KINGSLEY, President.

Mc

Actuary's Department

Rufus W. Weeks,

Vice-President and Chief Actuary

Arthur R. Grow, }
Arthur Hunter, } Actuaries.
Adolph Davidson, }

New York, Dec. 10, 1908.

Mr. Joseph W. Gould,
307 Water St.,
Pittsburg, Pa.

Dear Sir:—

The 20 Year Tontine Dividend Period of Policy
No. 305,011 on the life of yourself, will be completed
Jan. 22, 1909. It gives us pleasure to hand you state-
ment showing the Settlements from which a selection
is to be made in accordance with the provisions of
the policy, if it is in force at the end of Period.

The policy may be CONTINUED for the original
amount, and—

(A) The Dividend apportioned by the Company may be withdrawn in Cash.....	Cash Dividend \$871.70
or (B) The Dividend may be converted (subject to evi- dence of sound health satisfactory to the Com- pany) into a Paid-Up Addition to the policy.	Paid-up Addition \$0000.00
or (C) The Dividend may be converted into an Annuity on the life of the Insured, first payment to be made _____ and annually thereafter during his life.....	Annuity, \$_____
or The Dividend may be converted into a permanent Annual Reduction in subsequent Premiums pay- able upon this policy, first payment to be made Jan. 22, 1909.	\$63.70

Or, the policy may be DISCONTINUED, and—
[102]

- (M) The Total Value may be withdrawn in Cash..... Total Cash
 Total Value includes Cash Dividend.) \$2479.70
- or (N) The Total Value may be converted into Nonpar- Total Paid-up
 ticipating Paid-up Insurance payable at death Insurance,
 only. If the amount of the Paid-up policy ex-
 ceeds the amount of the original policy, evi-
 dence of sound health satisfactory to the Com-
 pany must be furnished..... \$4200.00
- or (O) The Total Value may be converted into an An-Total Annuity
 nuity on the life of the
 Insured, first payment to be made Jan. 22, 1910,
 and annually thereafter during the life..... \$195.40

Notification of choice of settlement is to be signed
 by Effie J. Gould, assignee.

Yours very truly,
 RUFUS W. WEEKS,
 Vice-President and Chief Actuary.

E. & O. E.

Exhibit C. [103]

[Exhibit "D" to Answer to Interrogatories in
 Boggs & Buhl vs. Dunlevy—Letter, February
 12, 1909, Gould to N. Y. Life Ins. Co.]

(COPY)

Orlando, Fla., Feb. 12th, 1909.

New York Life Ins. Co.,
 Pittsburg, Pa.

Re My Policy 305,011.

Gentlemen:

In regard to the maturing of the above policy, I
 elect Option M., and desire that you draw this check,
 \$2479.70, payable to my order and hand it to Mr.
 Moreland, c/o River Coal Company, Pittsburgh, Pa.,

who will deposit same in my bank, and who will also hand you the above policy for cancellation.

Yours truly,

J. W. GOULD.

Exhibit D. [104]

[Exhibit "E" to Answer to Interrogatories in
Boggs & Buhl vs. Dunlevy—Letter, May 27,
1909, Dunlevy to N. Y. Life Ins. Co.]

(COPY)

Oakland, Cal. 5/27/09.

The New York Life Ins. Co.,

New York, N. Y.

Gentlemen:

Your San Francisco representative advised me to write you for copy of Policy 305,011 made out in my favor & which matured Jany. 20, 1909. My father J. W. Gould who is located in Pgh., Pa has sent me two of the enclosed blanks to sign but if it is possible that I can collect same I do not feel justified in signing it even to him as I can prove that he told me on different occasions that when it matured I should have it. Kindly advise me of what prospects I have of collecting same & if any kindly take matter up with your representative here in San Francisco & when I hear from you will call & see them. If there

is no chance of my collecting same kindly keep the above confidential.

And greatly oblige

Yours respectfully,

(S.) MRS. EFFIE J. GOULD DUNLEVY.

9th & Oak,

Oakland, Cal.

c/o Madison Park Apartments.

Exhibit E. [105]

[Exhibit "F" to Answer to Interrogatories in
Boggs & Buhl vs. Dunlevy—Copy of Assign-
ment.]

(COPY)

FOR VALUE RECEIVED I hereby assign and transfer unto Joseph W. Gould of 7th Ave. Hotel, Liberty Ave., Pittsburg, Pa., the Policy of Insurance known as No. 305,011, issued by the
NEW YORK LIFE INSURANCE COMPANY
upon the life of Joseph W. Gould, of Pittsburg, Pa., and all dividend benefit, and advantage to be had or derived therefrom, subject to the conditions of the said Policy, and to the Rules and Regulations of the Company. This assignment is to take effect as of the 20 January, 1909.

WITNESS—hand and seal, this — day of
——, nine hundred —

_____,

State of _____,

County of _____, ss.

On this — day of —, 190—, before me personally came —, to me known to be the

individual described in and who executed the foregoing assignment, and acknowledged that ——— executed the same.

_____,

The NEW YORK LIFE INSURANCE COMPANY, in accordance with its rules, as stated below, has retained the duplicate of this assignment.

NEW YORK, _____, 190—.

NOTICE.—The rules of the Company require that Assignments of Policies issued by it shall be made in duplicate; that both copies shall be sent to the Home Office; and that one copy [106] shall be retained by the Company and the other returned.

The Company has no responsibility for the validity of any assignment.

The acknowledgment must be made before an Officer duly authorized to administer oaths, and his authority and the genuineness of his signature must be attested by the Clerk of a Court of Record, under his Official seal.

Branch Office,

Cashier.

Forwarded from _____ 190—.

Exhibit F. [107]

[Exhibit "G" to Answer to Interrogatories in
Boggs & Buhl vs. Dunlevy—Letter, June 10,
1909, McCall to Dunlevy.]

(COPY)

E.V.W.—K.

NEW YORK, June 10th, 1909.

Mrs. Effie J. Gould Dunlevy.

c/o Madison Park Apartments,

Ninth & Oak,

Oakland, California.

Re Policy No. 305,011.

Dear Madam:—

We beg to acknowledge receipt of your favor of May 27th, with reference to the above policy issued on the life of Joseph W. Gould. The Deferred Dividend Period under this policy expired January 22nd, last. Mr. Gould filed with us a selection of the Cash Value at that time. This Cash Value amounted to \$2479.70 and as the policy stood on our records as being assigneg to yourself we forwarded our check for the above amount to the Pittsburg office to be delivered to you subject to their obtaining from you a receipt for this amount, the policy, the original assignment in favor of yourself and your signature to the selection of option made by the insured. In view of your letter of May 27th just received we are recalling this check from our Pittsburg Office to be

held here until we hear further from you.

Yours truly,

JOHN C. McCALL, Secretary.

Per _____,
Superintendent.

Exhibit G. [108]

[Exhibit "H" to Answer to Interrogatories in
Boggs & Buhl vs. Dunlevy—Letter, June 23,
1909, Dunlevy to N. Y. Life Ins. Co.]

(COPY)

Oakland, Cal., June 23, 1909.

New York Life Ins. Co.

New York, N. Y.

Gentlemen:—

I am in receipt of yours of June 10th referring to cash surrender value under policy No. 305011 with your company. As yet I have been unable to find the policy and as I am away from home am not sure where it is.

In case I cannot locate it kindly advise me what affidavits are necessary. Will it be possible for me to convert the proceeds of this policy into a paid up policy payable to me at the death of the insured? Or could I draw the dividend, allowing the original policy to stand as at present? Trusting to hear from you soon I remain,

Yours sincerely,

(S.) Mrs. E. J. GOULD DUNLEVY.

Exhibit H. [109]

[Exhibit "I" to Answer to Interrogatories in
Boggs & Buhl vs. Dunlevy—Letter, July 22,
1909, Actuary to Dunlevy.]

(COPY)

G-N-M

New York, July 22, 1909.

Mrs. E. J. Gould Dunlevy,
Oakland, Calif.

405,011

Re Policy No. ~~305,011~~.

Dear Madam:—

We are in receipt of your favor of the 23rd ult., in reference to the above numbered policy, that

In reply we would call attention to ~~the~~ fact that the 20-Year Tontine Period of this policy expired Jan. 22nd, 1909, and as no further premiums have been paid the policy lapsed as of that date. Selection of option shall have been filed with the Company before that date, in accordance with the policy's terms.

We are willing, however, to allow at the present time a selection of option "A," under which the accumulated surplus of \$871.70 may be withdrawn, but in order to select this option it will be necessary to duly reinstate the policy and furnish the Company with satisfactory evidence of the insured's present insurability by one of our regular medical examiners, without expense to the Company, and pay premiums to Jan. 22nd, 1910.

Or, we will allow selection of option "N," that is, non-participating paid-up insurance of \$4200. but in order to select this option it will also be necessary

that we be furnished with the evidence of insurability referred to above.

Both of these offers will hold good for thirty days from the present date and if the Insured at present lives in Pittsburg or the vicinity and will communicate with our Branch Office at the Diamong Bldg., Liberty & 5th Aves., Pittsburg, Pa., the Cashier [110] at that Branch Office will give him the necessary information relative to the name and address of our medical examiner by whom the examination may be made.

Very truly yours,

_____,
Actuary.

Exhibit I. [111]

[Exhibit "J" to Answer to Interrogatories in Boggs & Buhl vs. Dunlevy—Letter, August 20, 1909, Reese to McCall.]

(COPY)

Pittsburgh, Pa., Aug. 20th, 1909.

Mr. John C. McCall,

Secretary of the New York Life Insurance Co.,
346 and 348 Broadway,
New York, N. Y.

Dear Sir:—

On January 24, 1889, your company issued to Joseph W. Gould of this City, your policy No. 305011, on his life in the sum of (\$5000). The policy is now paid out, all premiums having been fully paid thereon.

On June 27th, 1893, Capt. Gould assigned the above policy to his daughter, Effie J. Gould then of this

City; the daughter subsequently married and is now residing somewhere in the State of California, her Post Office address not being known to her father.

At the time the policy was assigned, Capt. Gould informs me, that it was not his intention to pass any title thereto to his daughter, except in the event of his death before maturity thereof. The policy never was delivered to the daughter to whom it was assigned, but has always been and now is in the possession of Capt. Gould the insured and he has paid all premiums maturing thereon since said assignment.

By authority of Joseph W. Gould the insured, under the above mentioned policy and at his request I write to notify your Company that no money is to be paid the said Effie J. Gould or her assigns on said policy by virtue of the assignment thereof to her, and he now requests and demands that the surrender value of said policy be paid to him notwithstanding said assignment.

I would thank you for an acknowledgment of this notice.

Very truly,

L. B. D. REESE,

Atty. for Joseph W. Gould.

Mailed Aug. 20, 1909.

Exhibit J. [112]

[Exhibit "K" to Answer to Interrogatories in
Boggs & Buhl vs. Dunlevy—Letter, August 30,
1909, Actuary to Reese.]

(COPY)

G-G-H.

New York, August 30th, 1909.

Mr. L. B. D. Reese,

#1016 Frick Building,

Pittsburg, Pa.

Re Policy 305,011 GOULD.

Dear Sir:—

I have your letter of August 20th, in regard to the assignment of this policy.

You state in your letter that Mr. Gould has no knowledge of the whereabouts of his daughter, and for your information we would say that we have received a number of letters from her dated at 9th and Oak Streets, Oakland, Cal. Our replies have been sent to the same address, and have evidently reached her. The assignment which we have on record appears to be a genuine and absolute assignment to Effie J. Gould, and is dated June 30th, 1893. In view of this assignment, we cannot, of course, pay the money to Mr. Gould until the matter is cleared up. As you state that Mr. Gould is now inclined to dispute the validity of the assignment, we would suggest that claimants take the matter into Court in order to have the question of ownership cleared up.

As we have no legal evidence of your power of attorney for Mr. Gould, the Company will require a copy of the power of attorney, or if you prefer, we

will file any letter that Mr. Gould may write us regarding the policy. I would suggest that you either have your letter of August 20th, 1909, re-written and signed by Mr. Gould before a Notary, duly acknowledged in accordance with the laws of Pennsylvania, or else that you file a duly acknowledged power of attorney for Mr. Gould. In the meantime, we will pay no money to anyone on account of this policy, and the equities of the [113] policy will be those stated in the policy itself.

I enclose herewith copy of a letter I have to-day written to Mrs. Dunlevy.

Yours very truly,

_____,
Actuary.

(Encl.)

Exhibit K. [114]

**[Exhibit "L" to Answer to Interrogatories in
Boggs & Buhl vs. Dunlevy—Letter, August 25,
1909, Dunlevy to Haskell.]**

(COPY.)

Oakland, Cal., 8/25/09.

Norman R. Haskell, Supt.

New York Life Ins. Co.

New York City.

Dear Sir:

I am in receipt of letter from your Actuary Department under date of Aug 18 & enclosing copy of their letter to me as of July 22nd.

As it appears that there is considerable red tape necessary to reinstate this policy, as it has apparently lapsed, I think I will take the cash surrender value

as outlined in your letter to me of June 10th.

I have been unable to locate the policy and would like to know what papers will have to be executed in order to close the matter.

Respt. yours,

(S) MRS. E. J. G. DUNLEVY.

Exhibit L. [115]

[Exhibit "M" to Answer to Interrogatories in
Boggs & Buhl vs. Dunlevy—Letter, August 30,
1909, Actuary to Dunlevy.]

(COPY)

G-G-H

New York, August 30th, 1909.

Mrs. E. J. G. Dunlevy,
9th & Oak Streets,
Oakland, Cal.

Re Policy 305,011—Gould.

Dear Madam:—

I have your letter of August 23rd, in regard to the above policy. I also have a letter under date of August 30th, from Mr. L. B. D. Reese, who acting as Attorney for your father, states that your father disputes the validity of the assignment made to you in 1893.

For your information, I am enclosing herewith copy of a letter written to-day in answer to Mr. Reese's letter, which also fully covers the points raised in your letter of the 23rd instant.

The offers communicated to you in our letter of July 23rd were limited to 30 days from that date. The time having expired, the Company hereby notified you that all offers made to you for settlement of

the policy are withdrawn and the policy will be settled in accordance with its terms.

Very truly yours,

Actuary.

(Encl.)

Exhibit M. [116]

**[Exhibit "N" to Answer to Interrogatories in
Boggs & Buhl vs. Dunlevy—Letter, September
3, 1909, Reese to Grow.]**

(COPY)

Pittsburgh, Pa., Sept. 3rd, 1909.

In re Policy No. 305,011—Gould.

Mr. A. R. Grow,

New York Life Insurance Co.,

346-348 Broadway,

New York City.

Dear Sir:—

I beg to acknowledge receipt of your favor of the 30th ult. in relation to the above policy issued on the life of Joseph W. Gould, and I thank you for the address of Mrs. Dunlevy, daughter of Mr. Gould. I have this day written her and there is a bare possibility that we may get the matter adjusted so as to give you no further trouble.

In the meantime, I telephoned Capt. Gould's hotel yesterday and learned that he is out of the city without leaving any address, but will no doubt return in a few days, and I shall be glad to comply with your suggestion in having him sign and acknowledge the letter I wrote you on the 20th ult.

I am glad to know that you will not pay any money on this policy until the controversy of ownership is cleared up.

Yours truly,
(S) L. B. D. REESE,
Atty. for Joseph W. Gould.

Exhibit N. [117]

[Exhibit "O" to Answer to Interrogatories in
Boggs & Buhl vs. Dunlevy—Letter, September
8, 1909, Gould to McCall.]

(COPY)

Pittsburgh, Pa., Sept. 8th, 1909.

Mr. John C. McCall,

Sec'y of New York Life Insurance Co.

346-348 Broadway,

New York City.

Dear Sir:—

On January 24th, 1889, your company issued to me your policy No. 305,011 on my life in the sum of Five Thousand Dollars (\$5,000). The policy is now paid out, all premiums having been fully paid thereon.

On June 27th, 1893, I assigned the above policy to my daughter, Effie J. Gould, then of this city, since married to one Dunlevy, who now resides, as I am informed by copy of a letter sent to my attorney, L. B. D. Reese, in Oakland, California. Prior to the information contained in your letter to Mr. Reese under date of August 30th, I was not aware of her postoffice address.

At the time the policy was assigned, it was not my intention to pass any title thereto to my daughter,

except in the event of my death before maturity. My reason for assigning it was that I contemplated marrying again and I wished to make this provision for my daughter in case of my death. The policy was never delivered to my daughter to whom it was assigned, but has always been, and now is, in my possession and I have paid all premiums maturing thereon since the above mentioned assignment.

I therefore write to notify your company that no money is to be paid to the said Effie J. Gould, now Effie J. Dunlevy, or her assigns, on said policy by virtue of the assignment thereof to her, and I now request and demand that the surrender value of said policy be paid to me notwithstanding said assignment.

I would thank you for an acknowledgment of this notice.

Very truly yours,

(Signed) JOSEPH W. GOULD. [118]

Attest: L. B. D. REESE.

State of Pennsylvania,

County of Allegheny,—ss.

Personally appeared before me, the undersigned, a Notary Public in and for the County of Allegheny and State of Pennsylvania the above-named Joseph W. Gould, who, in due form of law, acknowledged the foregoing letter to be his act and deed.

Witness my hand and Notarial seal this 8th day of September, A. D. 1909.

ALICE E. DUFF,

Notary Public.

My commission expires Jan. 21, 1911. [119]

[**Exhibit "P" to Answer to Interrogatories in
Boggs & Buhl vs. Dunlevy—Letter, October 6,
1909, Windrem to Haskell.**]

(COPY)

Point Richmond, Cal., 10/6/09.

Norman R. Haskell, Esq.,

New York City.

Dear Sir:—

I have been retained by Mrs. R. M. Dunlevy to represent her regarding the collection of Policy No. 305,011, issued on the life of Joseph W. Gould and assigned to Effie J. Gould now Mrs. Dunlevy, June 30th, 1893.

Will you please send me a copy of the policy and also of the assignment at your earliest convenience and oblige

Yours very truly,

(S.) LEE D. WINDREM.

Exhibit P. [120]

[**Exhibit "Q" to Answer to Interrogatories in
Boggs & Buhl vs. Dunlevy—Letter, October 25,
1909, McCall to Windrem.**]

(COPY)

E.V.W.—MT.

October 25th, 1909.

Mr. Lee D. Windrem,

Point Richmond, Cal.

Re. Pol. No. 305,011—Gould.

Dear Sir:—

Your favor of October 6th regarding this policy

has been duly received and as requested we hand you herewith a copy of the assignment referred to. We are enclosing a copy of the policy itself. This policy together with the original assignment are now in the insured possession so he advises us, same never having been delivered by him to Mrs. Dunlevy.

Yours truly,

JOHN C. McCALL,

Second Vice-Pres.,

Per _____,
Superintendent.

Exhibit Q. [121]

*In the Court of Common Pleas No. 4 of Allegheny
County, Penna.*

No. 253—First Term, 1910.

BOGGS & BUHL, Incorporated,

vs.

EFFIE J. DUNLEVY.

Rules for Judgment [in Boggs & Buhl vs. Dunlevy].

To William B. Kirker, Esq.,

Prothonotary:

Enter rule on Joseph W. Gould and the New York Life Insurance Company for judgment on admission contained in the respective answers filed separately by the garnishees and specify as follows:

FIRST: The New York Life Insurance Company admit having in its possession a check to the order and payable to Effie J. Gould, now Dunlevy, the defendant, for the sum of about Twenty-four Hundred (\$2400) Dollars, and prays the direction of

the Court in premises.

SECOND: The conclusion, as stated in the answer of the New York Life Insurance Company, respectively shows that it holds the amount as hereinbefore stated, subject to the only order and release of this defendant and surrender of the policy.

THIRD: The answer of Joseph W. Gould is insufficient to prevent judgment against his co-garnishee, in that the allegations of any interest he may have in the fund is based solely on his supposed right to revoke a former deed of conveyance and surrender.

FOURTH: The acknowledged assignment, dated June 30th, 1893, relieves the New York Life Insurance Company from every liability, under the terms of the written contract attached, to Joseph W. Gould, and makes this defendant the bona fide holder and the owner of the securities. [122]

FIFTH: The answer of Joseph W. Gould is inconsistent with the answer of his co-garnishee, the New York Life Insurance Company, as it only contains specifications of the right of redemption or the revocation of his own act after a lapse of seventeen years.

WHEREFORE, upon the admissions of the New York Life Insurance Company, the inconsistent answer of Joseph W. Gould is sufficient to warrant judgment to be entered for the plaintiff.

S. H. HUSELTON,
Attorney for Plaintiff.

Filed January 17th, 1910. [123]

**[Petition for Rule in Gould vs. Dunlevy et al. to
Show Cause Why They should not Proceed to
Interplead Together, and Order Thereon in
Boggs & Buhl vs. Dunlevy.]**

*In the Court of Common Pleas No. Four of Alle-
gheny County, Penna.*

No. 253—First Term, 1910.

BOGGS & BUHL, Incorporated,

vs.

EFFIE J. DUNLEVY.

To the Honorable the Judges of said Court:

The petition of the New York Life Insurance Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York and one of the Garnishees in the above-entitled execution attachment proceedings, respectfully represents:

(1) In the year 1889, to wit, on January 22nd, your petitioner duly entered into a contract with Joseph W. Gould, the father of Effie J. Dunlevy, the defendant above named, and one of the garnishees in the above-entitled proceeding, by the terms of which contract your petitioner undertook to and did insure the life of the said Joseph W. Gould, as evidenced by its policy, No. 305,011. Said policy provided, *inter alia*, for the distribution of certain benefits to the insured at the termination of a Tontine Period named therein, which benefits were in the form of a cash surrender value and amount to the sum of Two Thousand

Four Hundred Seventy-nine and 70/100 (\$2479.70) Dollars.

(2) In the year 1893, to wit, on June 27th, the said Joseph W. Gould made and executed a certain written instrument purporting to be an assignment of said policy to his daughter, Effie J. Gould, the defendant above named, who was at that time thirteen years of age. The following is a true copy of said instrument, the original of which was filed with your petitioner, the New York Life Insurance Company. [124]

FOR VALUE RECEIVED, I hereby assign and transfer unto Effie J. Gould, of Pittsburgh, Pa., the policy of insurance known as No. 305,011, issued by the New York Life Insurance Company upon the life of Joseph W. Gould, of Pittsburgh, Pa., and all dividend, benefit and advantage to be had or derived therefrom, subject to the conditions of the said policy, and to the rules and regulations of the Company.

WITNESS my hand and seal, this 27th day of June, one thousand eight hundred and ninety-three.

JOSEPH W. GOULD.

State of Pennsylvania,
County of Allegheny,—ss.

On this 27th day of June, 1893, before me, personally came Joseph W. Gould, to me known to be the individual described in and who executed the foregoing assignment, and acknowledged that he executed the same.

HENRY C. RYAN,
Notary Public.

The New York Life Insurance Company, in accordance with its rules, as stated below, has retained the duplicate of this assignment.

JOHN A. McCALL,
per HAWES.

New York, June 30, 1893.

NOTICE: The rules of the Company require that assignments of policies issued by it shall be made in duplicate; that both copies shall be sent to the home office; and that one copy shall be retained by the Company and the other returned.

The Company has no responsibility for the validity of any assignment.

The acknowledgment must be made before an officer duly authorized to administer oaths, and his authority and the genuineness [125] of his signature must be attested by the clerk of a court of record, under his official seal.

Forwarded from ——— Branch Office.

———, 190——,

—————,
Cashier.

(3) The said Effie J. Gould named in the foregoing instrument has since intermarried with R. M. Dunlevy and is the same person as Effie J. Dunlevy, the defendant above named.

(4) The Tontine Period provided for in said policy expired on January 22nd, 1909, subsequent to which time your petitioner issued its check to the order of Effie J. Gould, Assignee for the sum of Two Thousand Four Hundred Seventy-nine and 70/100 (\$2479.70) Dollars, to be delivered to her in exchange

for certain papers including the original policy of insurance and the necessary receipts.

(5) Before said check had been delivered, however, your petitioner received a communication from Joseph W. Gould, claiming for himself the fund in your petitioner's hands, a copy of which communication is as follows:

COPY.

L. B. D. REESE,
Attorney at Law,
1016 Frick Building,

Tel. 2292.

Pittsburgh, Pa., September 8th, 1909.

Mr. John C. McCall,

Sec'y of New York Life Insurance Company,
346-348 Broadway, New York City.

Dear Sir:—

On January 24th, 1889, your company issues to me your policy No. 305,011 on my life in the sum of Five Thousand Dollars (\$5000.00). The policy is now paid, all premiums having been fully paid thereon.
[126]

On June 27th, 1893, I assigned the above policy to my daughter Effie J. Gould, then of this City, since married to one Dunlevy, who now resides, as I am informed by a copy of a letter sent to my attorney, L. B. D. Reese, in Oakland, California. Prior to the information contained in your letter to Mr. Reese under date of August 30th, I was not aware of her postoffice address.

At the time the policy was assigned, it was not my intention to pass any title thereto to my daughter,

except in the event of my death before maturity. My reason for assigning it was that I contemplated marrying again and I wished to make this provision for my daughter in case of my death. The policy was never delivered to my daughter, to whom it was assigned, but has always been, and now is, in my possession and I have paid all premiums maturing thereon since the above-mentioned assignment.

I therefore write to notify your company that no money is to be paid to the said Effie J. Gould, now Effie J. Dunlevy, or her assigns, on said policy by virtue of the assignment thereof to her, and I now request and demand that the surrender value of said policy be paid to me notwithstanding said assignment.

I would thank you for an acknowledgment of this notice.

Very truly yours,

(S) JOSEPH W. GOULD.

Attest: L. B. D. REESE.

State of Pennsylvania,
County of Allegheny,—ss.

Personally appeared before me, the undersigned, a Notary Public in and for the County of Allegheny and State of Pennsylvania, the above named Joseph W. Gould, who in due form of law, acknowledged the foregoing letter to be his act and deed. [127]

WITNESS my hand and Notarial Seal this 8th day of September, A. D. 1909.

[Seal]

(6) Your petitioner is informed that Effie J. Dunlevy the defendant above named, is a resident of

the City of Oakland in the State of California, and that in the year 1910, to wit, on January 14th, she instituted a suit in the Superior Court of the State of California in and for the County of Marin, against your petitioner, the New York Life Insurance Company, in which suit she seeks to recover the sum of Two Thousand Four Hundred Seventy-nine and 70/100 (\$2479.70) Dollars on account of policy No. 305,011, issued by your petitioner upon the life of Joseph W. Gould.

(7) Your petitioner is informed that both the original policy No. 305,011, issued by your petitioner, and the duplicate of the assignment above referred to are at the present time in the custody and possession of the said Joseph W. Gould.

(8) Your petitioner is ready and desirous of making immediate payment of the fund of Two Thousand Four Hundred Seventy-nine and 70/100 (\$2,479.70) Dollars to the party or parties lawfully entitled thereto and has no interest therein or claim thereto.

WHEREFORE, your petitioner prays your Honorable Court for a rule on said Effie J. Dunlevy, Joseph W. Gould and Boggs & Buhl, Incorporated, to show cause why they should not interplead together for the purpose of ascertaining to which of said parties the money in the hands of petitioner belongs, and why your petitioner should not be permitted, when it is determined to whom the money ought to be paid, to pay the said sum of Two Thousand Four Hundred Seventy-nine and 70/100 (\$2,479.70) Dollars into court for the benefit of such

person as shall appear to be entitled thereto, and for such further orders in the premises as to your Honors may seem necessary. [128]

NEW YORK LIFE INSURANCE COMPANY.

By GORDON & SMITH,
Its Attorneys.

State of New York,
City and County of New York,—ss.

On this 2nd day of February, 1910, before me personally appeared Seymour M. Ballard, Secretary of the New York Life Insurance Company, the petitioner within named, who being by me duly sworn according to law deposes and says that he is the Secretary of the New York Life Insurance Company and familiar with its business, and that the facts stated in the foregoing petition are true and correct.

SEYMOUR M. BALLARD,

Subscribed and sworn to before me this 2d day of February, 1910.

[Seal]

RALPH FREEMAN,
Notary Public.

ORDER.

And now, to wit, Febry. 5th, 1910, the foregoing petition of the New York Life Insurance Company, Garnishee, being presented in open Court, upon consideration thereof and on motion of Gordon & Smith, attorneys for petitioner, a rule is granted on Effie J. Dunlevy, Joseph W. Gould and Boggs & Buhl, Incorporated, to show cause why they should not interplead together for the purpose of ascertaining to which of said parties the money in the hands of the

New York Life Insurance Company belongs, and why said Company [129] should not be permitted, when it is determined to whom the money ought to be paid, to pay said sum of Two Thousand Four Hundred Seventy-nine and 70/100 (\$2,479.70) Dollars into court for the benefit of such person as shall appear to be entitled thereto. And it appearing that the said Effie J. Dunlevy is a resident of the State of California, it is hereby ordered and decreed that service or said rule upon Effie J. Dunlevy be by serving her personally with a copy of this petition and order, or by sending a copy of the same by mail or registered mail, to her to her last *know* address.

Rule returnable the 26th day of Feb., 1910.

By the Court.

Filed Feb. 5th, 1910. [130]

**[Answer of Joseph W. Gould to Rule to Show Cause
in Boggs & Buhl vs. Dunlevy.]**

In the Court of Common Pleas No. Four of Allegheny County.

No. 253—First Term, 1910.

BOGGS & BUHL, INCORPORATED,

vs.

EFFIE J. DUNLEVY.

**ANSWER OF JOSEPH W. GOULD TO THE
RULE GRANTED.**

February 5th, 1910, to Show Cause Why Respondent and Others Should not Interplead Together for the Purpose of Ascertaining to Whom the Money, Now in the Hands of the New York Life Insurance Company, Should be Paid.

State of California,
County of Los Angeles,—ss.

Joseph W. Gould, being duly sworn according to law, deposes and says that on the 24th day of January, 1889, the New York Life Insurance Company issued on his life their policy No. 305,011 in the sum of Five Thousand Dollars (\$5,000), wherein said Company agreed to pay to his executors, administrators or assigns, the sum of Five Thousand Dollars (\$5,000) upon receipt and approval at said office of proofs of his death during the continuance of said policy, after deducting therefrom all indebtedness to said company, together with any balance of premiums remaining unpaid, and with the surrender of said policy. On or about June 27th, 1893, being desirous of assigning said policy conditionally to his daughter, Effie J. Gould, now intermarried with R. M. Dunlevy, respondent called at the office of the New York Life Insurance Company and requested R. H. McCreary, the agent then in charge of said office, to have said policy assigned to respondent's daughter, the said Effie J. Gould (now Dunlevy), on condition that he should die before said policy was paid in full, desiring to reserve to himself the right to collect any money to be paid on said policy at the maturity thereof [131] if respondent should so long live. The agent of said company had said assignment prepared and respondent signed the same on his assertions that it was an assignment to respondent's said daughter of the said policy only on the condition that respondent should die before the

maturity of said policy or before all the premiums were paid thereon. Respondent did not read the assignment before executing the same, relying on the statement of the said McCreary, the agent of said company, that he was assigning it conditionally in the manner hereinbefore stated. Respondent had no intention of making an absolute assignment of said policy, such as now appears to have been made, to his daughter Effie J. Dunlevy, or to any other person.

The said policy was never delivered to the said Effie J. Gould (now Dunlevy), to whom it was assigned, but has always been and is now in the possession of respondent, and respondent has paid all premiums maturing on said policy since said assignment, and at maturity he supposed that he would have no difficulty in collecting the amount of the surrender value of said policy but was met with said assignment.

On August 20th, 1909, respondent, through his attorney L. B. D. Reese, notified the said New York Life Insurance Company not to pay any moneys due thereon unto the said Effie J. Dunlevy or to any person representing her; and soon thereafter respondent notified said company by letter to pay no moneys due or to become due on said policy to the said Effie J. Gould (now Dunlevy) or to any person representing her. Respondent denies that the said Effie J. Gould (now Dunlevy) has any interest in said policy, and avers that whatever there is due thereon belongs to respondent and not to the said Effie J. Gould (now Dunlevy).

Respondent avers that he would not have executed

said assignment had he not been informed by said McCreary, the agent of said company, that he was making a conditional assignment of said [132] policy, that the same was to be effective in case of respondent's death only before the maturity thereof, and to be void in case respondent should be living at the time said policy should be paid in full, that is at the maturity thereof.

Respondent further avers that said Effie J. Gould (now Dunlevy) had no knowledge whatever of the assignment of said policy to her until so notified by the said New York Life Insurance Company after the maturity of said policy.

And respondent further avers that the said company knew, or ought to have known through its agent at Pittsburgh, the said R. H. McCreary, that said policy was assigned to his daughter on condition that if respondent should die before the maturity thereof that said assignment was to be an absolute one, otherwise the surrender value of said policy was to be paid respondent, and avers that he was misled by said company's agent in the making of said absolute assignment; and further avers that neither said policy nor the assignment thereof was at any time since the issuing of said policy or said assignment in the possession of the said Effie J. Gould (now Dunlevy), but that the said policy and the said assignment has always remained in the possession of this respondent, and he denies that the said Effie J. Gould (now Dunlevy) ever paid any consideration to respondent for the assignment thereof; and that said assignment was made only for the purpose of protection to

the said Effie J. Gould (now Dunlevy) in case of respondent's death before the maturity of said policy.

By reason of the matters hereinbefore set forth, respondent avers that he is entitled to have the surrender value of said policy paid to him in full, to wit, the sum of \$2,479.70, and that said sum, nor any part thereof, should be paid to the said Effie J. Gould (now Dunlevy). [133]

JOSEPH W. GOULD.

Sworn to and subscribed before me this 14th day of February, 1910.

[Seal]

MARY E. NUNEZ,

Notary Public in and for County of Los Angeles,
State of California.

My commission expires Feby. 25th, 1913.

Filed Feb. 19, 1910. [134]

**[Answer of Boggs & Buhl to Petition of N. Y. Life
Ins. Co. in Boggs & Buhl vs. Dunlevy.]**

*In the Court of Common Pleas No. Four of Alle-
gheny County.*

No. 253—First Term, 1910.

BOGGS & BUHL, INCORPORATED,

vs.

EFFIE J. DUNLEVY.

**ANSWER OF ATTACHMENT CREDITOR TO
PETITION.**

Boggs & Buhl, Incorporated, execution attachment creditor in the above-stated case, by its attorney, S. H. Huselton, makes answer to the petition of the New York Life Insurance Company, Garnishee,

and for matters therein respectfully sets forth as follows:

First: That a rule for judgment is pending on behalf of the attachment creditor.

Second: That an action has been instituted by this defendant against the New York Life Insurance Company, in the Superior Court of California, in which said action the right of the fund will be determined.

Third: The New York Life Insurance Company is not a party to the fund in question, and its action to suggest an interpleader would obviate the attachment creditor's right in its rule for judgment.

Fourth: That the attachment creditor will admit the right of the New York Life Insurance Company, Garnishee, to pay the money into Court, and to be further relieved from responsibility.

Wherefore the rule on the part of the New York Life Insurance Company as to the framing of an issue to determine the question of ownership of the fund, should be discharged and that the said garnishee be directed to pay the said fund into court as is set forth in the prayer of its petition.

S. H. HUSELTON,

Attorney for Boggs & Buhl.

Filed Feby. 26, 1910. [135]

In the Court of Common Pleas No. Four of Allegheny County, Pa.

No. 253—First Term, 1910.

BOGGS & BUHL, INCORPORATED,

vs.

EFFIE J. DUNLEVY.

**Affidavit of Service upon Effie J. Dunlevy of Notice,
Petition, and Order of Court [in Boggs & Buhl
vs. Dunlevy].**

State of California,

City and County of San Francisco,—ss.

T. W. McFarland, being duly sworn, deposes and says that he is a male person over the age of twenty-one years and not a party to nor interested in the above-entitled case.

That on the 18th day of February, 1910, at the City and County of San Francisco, in said State of California, affiant personally served the annexed notice, petition and order upon Effie J. Dunlevy, the defendant named therein, by personally delivering to and leaving with said Effie J. Dunlevy a true and correct copy of said annexed notice and petition and order.

And further affiant saith not.

T. W. MacFARLANE.

Subscribed and sworn to before me this 18th day of February, 1910.

[Seal]

HENRY P. TRICOU,

Notary Public in and for the City and County of San Francisco, State of California. [136]

Copy of Notary's Certificate.

County Clerk General Dept. Blank Form No. 137.

B. & P.°°

State of California,

City and County of San Francisco,—ss.

I, H. I. Mulcrevy, County Clerk of the City and County of San Francisco, and ex-officio Clerk of the Superior Court thereof, the same being a Court of record, the officer authorized by the laws of the State of California to make the following certificate, DO HEREBY CERTIFY that Henry P. Trincou of the City and County of San Francisco whose name is subscribed to the annexed instrument and thereon written and before whom the annexed oath or affidavit was taken, was at the time of taking such oath or affidavit, a Notary Public in and for the said City and County of San Francisco, residing in said City and County, duly authorized to take the same, and an officer duly authorized by the laws of said State to take and certify the acknowledgment and proof of deeds to be recorded in said State. And further that I am well acquainted with the handwriting of such officer, and verily believe that the signature to such jurat or certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said *Court the* City and County of San Francisco, the Feb. 21, 1910, *day of*.

H. I. MULCREVY,

Clerk. [137]

*In the Court of Common Pleas No. 4 of Allegheny
County, Pa.*

No. 253—First Term, 1910.

BOGGS & BUHL, INCORPORATED,

vs.

EFFIE J. DUNLEVY.

**Notice [to Effie J. Dunlevy of Granting of Rule to
Show Cause].**

To Effie J. Dunlevy:

Please take notice that a rule to show cause why Effie J. Dunlevy, Jos. W. Gould and Boggs & Buhl, Incorporated, should not interplead together for the purpose of ascertaining to which of said parties \$2479.70 in *ahd* hands of the New York Life Insurance Company belongs, has been granted in the above-entitled case returnable February 26, 1910.

GORDON & SMITH,

Attys. for New York Life Insurance Co.

State of ———,

County of ———,—ss.

Before me, the subscriber, a Notary Public in and for the aforesaid State and County, personally appeared ———, who having been duly sworn according to law, deposes and says that he served a copy of the within notice, Petition and Order of Court on Mrs. Effie J. Dunlevy, on the ——— day of ———, 1910, by handing her a true copy thereof.

_____.

Sworn to and subscribed before me this ——— day
of ———, 1910.

_____. [138]

*In the Court of Common Pleas No. 4 of Allegheny
County, Pa.*

No. 253—First Term, 1910.

BOGGS & BUHL, INCORPORATED,

vs.

EFFIE J. DUNLEVY.

**Petition [of N. Y. Life Ins. Co. for Rule on Effie J.
Dunlevy et al. to Show Cause Why They Should
not Interplead Together, etc., in Boggs & Buhl
vs. Dunlevy].**

To the Honorable the Judges of said Court.

The Petition of the New York Life Insurance Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York and one of the Garnishees in the above-entitled execution attachment proceedings, respectfully represents:

(1) In the year 1889, to wit, on January 22d, your petitioner duly entered into a contract with Joseph W. Gould the father of Effie J. Dunlevy, the defendant above named, and one of the garnishees in the above-entitled proceeding, by the terms of which contract your petitioner undertook to and did insure the life of the said Joseph W. Gould, as evidenced by its policy No. 305,011. Said policy provided, *inter alia*, for the distribution of certain benefits to the insured at the termination of a Tontine Period named therein, which benefits were in the form of a cash surrender value and amount to the sum of Two Thousand Four

Hundred Seventy-nine and 70/100 (\$2479.70)
Dollars.

(2) In the year 1893, to wit, on June 27th, the said Joseph W. Gould made and executed a certain written instrument purporting to be an assignment of said policy to his daughter, Effie J. Gould, the defendant above named, who was at that time thirteen years of age. The following is a true copy of said instrument, the original of which was filed with your petitioner, the New York Life Insurance Company;

FOR VALUE RECEIVED, I hereby assign and transfer unto Effie J. Gould, of Pittsburgh, Pa., the policy of insurance known [139] as No. 305,011, issued by the New York Life Insurance Company upon the life of Joseph W. Gould, of Pittsburgh, Pa., and all dividend, benefit and advantage to be had or derived therefrom, subject to the conditions of said policy, and to the rules and regulations of the Company.

WITNESS my hand and seal this 27th day of June, one thousand eight hundred and ninety-three.

JOSEPH W. GOULD.

State of Pennsylvania,
County of Allegheny,—ss.

On this 27th day of June, 1893, before me personally came Joseph W. Gould, to me known to be the individual described in and who executed the foregoing assignment, and acknowledged that he executed the same.

HENRY C. RYAN,
Notary Public.

The New York Life Insurance Company, in accord-

ance with its rules, as stated below, has retained the duplicate of this assignment.

JOHN A. McCALL.

Per HAWES.

New York, June 30, 1893.

NOTICE: The rules of the Company require that assignments of policies issued by it shall be made in duplicate; that both copies shall be sent to the home office; and that one copy shall be retained by the Company and the other returned.

The Company has no responsibility for the validity of any assignment.

The acknowledgment must be made before an officer duly authorized to administer oaths, and his authority and the genuineness of his signature must be attested by the clerk of a court of record, under his official seal. [140]

Forwarded from ——— Branch Office, ———, 190——.

—————,
Cashier.

(3) The said Effie J. Gould named in the foregoing instrument has since intermarried with R. M. Dunlevy and is the same person as Effie J. Dunlevy, the defendant above named.

(4) The Tontine Period provided for in said policy expired on January 22d, 1909, subsequent to which time your petitioner issued its check to the order of Effie J. Gould, Assignee, for the sum of Two Thousand Four Hundred Seventy-nine and 70/100 (\$2,479.70) Dollars, to be delivered to her in exchange for certain papers including the original policy of in-

surance and the necessary receipts.

(5) Before said check had been delivered, however, your petitioner received a communication from Joseph W. Gould, claiming for himself the fund in your petitioner's hands, a copy of which communication is as follows:

Copy:

L. B. D. REESE.

Attorney at Law,

1016 Frick Building,

Tel. 2292.

Pittsburgh, Pa., Sept. 8th, 1909.

Mr. John C. McCall,

Sec'y of New York Life Insurance Company,
346-348 Broadway, New York City.

Dear Sir:

On January 24th, 1889, your company issues to me your policy No. 305,011 on my life in the sum of Five Thousand Dollars (\$5,000.00). The policy is now paid, all premiums having been fully paid thereon.

On June 27th, 1893, I assigned the above policy to my daughter, Effie J. Gould, then of this City, since married to one Dunlevy, who now resides, as I am informed by a copy of a letter [141] sent to my attorney, L. B. D. Reese, in Oakland, California. Prior to the information contained in your letter to Mr. Reese under date of August 30th, I was not aware of her postoffice address.

At the time the policy was assigned, it was not my intention to pass any title thereto to my daughter, except in the event of my death before maturity. My reason for assigning it was that I contemplated

marrying again and I wished to make this provision for my daughter in case of my death. The policy was never delivered to my daughter, to whom it was assigned, but has always been, and now is, in my possession, and I have paid all premiums maturing thereon since the above-mentioned assignment.

I therefore write to notify your company that no money is to be paid to the said Effie J. Gould, now Effie J. Dunlevy, or her assigns, on said policy by virtue of the assignment thereof to her, and I now request and demand that the surrender value of said policy be paid to me notwithstanding said assignment.

I would thank you for an acknowledgment of this notice.

Very truly yours,

(S) JOSEPH W. GOULD.

Attest: L. B. D. REESE.

State of Pennsylvania,
County of Allegheny,—ss.

Personally appeared before me, the undersigned, a Notary Public, in and for the County of Allegheny and State of Pennsylvania, the above named Joseph W. Gould, who in due form of law acknowledged the foregoing letter to be his act and deed.

WITNESS my hand and Notarial Seal this 8th day of September, A. D. 1909.

[Seal] [142]

(6) Your petitioner is informed that Effie J. Dunlevy, the defendant above named, is a resident of the city of Oakland, in the State of California, and that in the year 1910, to wit, on January 14th,

she instituted a suit in the Superior Court of the State of California, in and for the County of Marin, against your petitioner, the New York Life Insurance Company, in which suit she seeks to recover the sum of Two Thousand Four Hundred Seventy-nine and 70/100 (\$2,479.70) Dollars on account of policy No. 305,011, issued by your petitioner upon the life of Joseph W. Gould.

(7) Your petitioner is informed that both the original policy No. 305,011, issued by your petitioner, and the duplicate of the assignment above referred to are at the present time in the custody and possession of the said Joseph W. Gould.

(8) Your petitioner is ready and desirous of making immediate payment of the fund of Two Thousand Four Hundred Seventy-nine and 70/100 (\$2,479.70) Dollars to the party or parties lawfully entitled thereto and has no interest therein or claim thereto.

WHEREFORE, your petitioner prays your Honorable Court for a rule on said Effie J. Dunlevy, Joseph W. Gould and Boggs & Buhl, Incorporated, to show cause why they should not interplead together for the purpose of ascertaining to which of said parties the money in the hands of petitioner belongs, and why your petitioner should not be permitted, when it is determined to whom the money ought to be paid, to pay the said sum of Two Thousand Four Hundred Seventy-nine and 70.100 (\$2,479.70) Dollars into Court for the benefit of such person as shall appear to be entitled thereto, and for

such further orders in the premises as to your Honors may seem necessary.

NEW YORK LIFE INSURANCE COMPANY,

By GORDON & SMITH,

Its Attorneys.

State of New York,

City and County of New York,—ss.

On this 2d day of February, 1910, before me personally appeared [143] Seymour M. Ballard, Secretary of the New York Life Insurance Company, the petitioner within named, who being by me duly sworn according to law, deposes and says that he is the Secretary of the New York Life Insurance Company and familiar with its business, and that the facts stated in the foregoing petition are true and correct.

(Signed) SEYMOUR M. BALLARD.

Subscribed and sworn to before me this 2d day of February, 1910.

[Notary Seal]

RALPH FREEMAN,

Notary Public.

Order [in Boggs & Buhl vs. Dunlevy Granting Rule on Effie J. Dunlevy et al. to Show Cause Why They Should not Interplead Together, etc.].

And now, to wit, February 5th, 1910, the foregoing petition of the New York Life Insurance Company, Garnishee, being presented in open court, upon consideration thereof, and on motion of Gordon & Smith, attorneys for petitioner, a rule is granted on Effie J. Dunlevy, Joseph W. Gould and Boggs & Buhl, Incorporated, to show cause why they should not interplead together for the purpose of ascertaining to

which of said parties the money in the hands of the New York Life Insurance Company belongs, and why said Company should not be permitted, when it is determined to whom the money ought to be paid, to pay said sum of Two Thousand Four Hundred Seventy-nine and 70/100 (\$2,479.70) Dollars into court for the benefit of such person as shall appear to be entitled thereto. And it appearing that the said Effie J. Dunlevy is a resident of the State of California, it is hereby ordered and decreed that service of said rule upon Effie J. Dunlevy be by serving her personally with a copy of this petition and order, or by sending a copy of same, by mail or registered mail, to her at her last known address.

Rule returnable the 26th day of February, 1910.

Filed March 1st, 1910.

By the Court. [144]

[Statement of Boggs & Buhl in Boggs & Buhl vs. Gould.]

In the Court of Common Pleas No. 4 of Allegheny County, Pa.

EXECUTION ATTACHMENT.

No. 253—First Term, 1910.

Feigned Issue.

BOGGS & BUHL,

Claimant,

vs.

JOS. W. GOULD,

Defendant.

CLAIMANT'S STATEMENT.

Boggs & Buhl, Attachment Creditor, claimant

above named, by its attorney, S. H. Huselton, respectfully represents:

That by order of Court (opinion filed) the defendant, Effie J. Dunlevy, together with all attachment creditors who may wish to intervene, were made claimants, and Joseph W. Gould the defendant; also by a further order of Court, the New York Life Insurance Company, the co-garnishee of Joseph W. Gould, the defendant, was directed to pay into court the fund in its possession, the ownership of which to be determined by this issue.

The defendant, Joseph W. Gould, is the father of Effie J. Dunlevy, the defendant in the execution attachment.

That on or about the 22d day of January, 1889, the New York Life Insurance Company issued a policy upon the life of the defendant herein, Joseph W. Gould, which said policy was numbered 305,011, and among other things provided that said policy, at the expiration of twenty years would have a cash surrender value; that all of the terms and provisions of said policy agreed to be performed by the said Joseph W. Gould having been fully performed and discharged, that under and by virtue of the terms and provisions of said policy there became due, and was due on January 22d, 1909, to Effie J. Dunlevy (*nee* Gould) the assignee beneficiary, the sum of \$2,479.70.

That by virtue of an assignment dated 27th day of June, 1893, made and executed by Joseph W. Gould in writing, assigned all his rights and benefits under and by terms of said policy to said [145]

Effie J. Dunlevy in words and figures following, to wit:

“For value received I hereby assign and transfer unto Effie J. Gould, of Pittsburgh, Pa., the policy of insurance known as No. 305,011, issued by the New York Life Insurance Company upon the Life of Joseph W. Gould, of Pittsburgh, Pa., and all dividend, benefit and advantage to be had or derived therefrom, subject to the conditions of the said policy and to the rules and regulations of the Company.

WITNESS my hand and seal this 27th day of June, One Thousand Eighteen Hundred and Ninety-three.

(Signed) JOSEPH W. GOULD.”

State of Pennsylvania,
County of Allegheny,—ss.

On this 27th day of June, 1893, before me personally came Joseph W. Gould, to me known to be the individual described in and who executed the foregoing assignment and acknowledged that he executed the same.

(Signed) HENRY C. RYAN,
Notary Public.”

“The New York Life Insurance Company, in accordance with its rules, as stated below, has retained the duplicate of this assignment.

(Signed) JOHN A. McCALL, Pres.,
Per E. LAWS.

New York, June 30th, 1893.”

Which said assignment was delivered to the New York Life Insurance Company on the 30th day of June, 1893; the said New York Life Insurance Com-

pany made and executed a certain instrument in writing in words and figures following:

“The New York Life Insurance Company, in accordance with its rules, as stated below, has retained the duplicate of this assignment.

(Signed) JOHN A. McCALL, Pres.

Per E. LAWES.” [146]

Wherefore, by virtue of the foregoing assignment, duly executed, made and delivered by this defendant, Joseph W. Gould, as herein set forth, all the rights and benefits of the fund as aforesaid is now the property of Effie J. Dunlevy, and by reason thereof the claimant herein, Boggs & Buhl, claims of the said estate the amount as may appear by liquidation of the judgment in its attachment execution, all of which it will expect to prove upon the trial of this cause.

S. H. HUSELTON,

Attorney for Plaintiff.

Allegheny County,—ss.

Personally appeared before me, the undersigned authority, W. C. Georgi, who being duly sworn, says that he is Credit Manager of Boggs & Buhl Company, a corporation, and its duly authorized Agent in this behalf, says that the Statements herein contained, in so far as the same are within his own knowledge, are true, and that from information he derives from others verily believes to be true.

W. C. GEORGI.

Sworn and subscribed before me this 1st day of April, 1910.

[Seal]

L. H. McCABE,

Notary Public.

Commission expiring January 19, 1911.

ORDER.

Now, to wit, May 21st, on motion of S. H. Huselton, Attorney of Claimant, it is hereby ordered that the within statement be marked refiled.

By the Court.

Filed Apr. 1st, 1910—refiled May 21st, 1910. [147]

Order [Framing Issue, etc., in Boggs & Buhl vs. Gould].

In the Court of Common Pleas No. 4 of Allegheny County.

No. 253—First Term, 1910.

Feigned Issue.

BOGGS & BUHL, INC., et al.,

vs.

JOS. W. GOULD.

COPY OF ORDER OF COURT FRAMING ISSUE
AND DIRECTING NOTICE TO ATTACH-
ING CREDITORS WITH ACCEPTANCE
OF SERVICE AND NOTICE.

(Copy.)

“And now, to wit, May 3d, 1910, it is ordered that the issue to be tried in this case shall be as follows, to wit: Whether Joseph W. Gould made a valid gift of policy No. 305,011, issued to him by the New York Life Insurance Company, to Effie J. Gould, now Effie J. Dunlevy.”

“All attaching creditors of the said Effie J. Dunlevy who desire to intervene in this proceeding are required to do so as plaintiffs herein on fifteen (15) days' notice to the attorneys of record, and to file

their statements of claim or demand herein within said period of fifteen (15) days.”

By the Court.

You are hereby notified that the Court this day made the foregoing order in the above-stated case, and you are further notified to comply therewith within the time limited therein.

L. B. D. REESE,
Atty. for Joseph W. Gould.

Pittsburgh, May 3d, 1910.

To W. C. McClure, Esq., Attorney for Sarah B. Gould, A. J. Gould and Frank W. Taft.

To Robert P. Watt, Esq., Attorney for Pittsburgh Bank for Savings.

To Patterson, Sterrett & Acheson, Attorneys for Lincoln National Bank. [148]

To S. H. Huselton, Esq., Attorney for Boggs & Buhl.

To Levi Bird Duff, Esq., Attorney for Charles Elste.

Service of notice of the within order of Court accepted this 3d day of May, 1910.

LEVI BIRD DUFF,
CHARLES ELSTE,
PATTERSON, STERRETT & ACHESON,
Attys. for Lincoln Nat'l Bank.

S. H. HUSELTON,
Atty. for Boggs & Buhl.

ROBERT P. WATT,
Atty. for Pittsburgh Bank for Savings.

W. C. McCLURE,
Atty. for A. J. Gould, Sarah B. Gould and Frank W. Taft.

Filed May 3d, 1910. [149]

[Statement of A. J. Gould in Boggs & Buhl vs.
Gould.]

*In the Court of Common Pleas No. 4 of Allegheny
County, Pa.*

No. 253—First Term, 1910.

Feigned Issue.

BOGGS & BUHL, INC., et al.,

vs.

JOSEPH W. GOULD.

CLAIMANT'S STATEMENT.

A. J. Gould, attachment creditor, by his attorney,
W. C. McClure, respectfully represents:

That by order of Court, at the number and term
of above execution attachment, the defendant in the
attachment, Effie J. Dunlevy, together with all
attachment creditors who may wish to intervene
were made claimants, and Joseph W. Gould the
defendant; also by a further order of Court the New
York Life Insurance Company Garnishee was di-
rected to pay into court the fund in its possession,
the ownership of which to be determined by this
issue.

The defendant Joseph W. Gould is the father of
Effie J. Dunlevy, the defendant in the execution
attachment. That on or about the 22d day of Jan-
uary, 1889, the New York Life Insurance Company
issued a policy upon the life of the defendant herein,
Joseph W. Gould, which said policy was No. 305,011,
and, among other things, provided, that said policy
at the expiration of twenty years, would have a cash

surrender value. That all the terms and provisions of said policy agreed to be performed by the said Joseph W. Gould having been fully performed and discharged, under and by virtue of the terms and provisions in said policy there became due and was due on January 22d, 1909, and is still unpaid, to Effie J. Dunlevy (*nee* Gould) the assignee beneficiary, the sum of \$2,479.70. That by virtue of an assignment dated June 27th, 1893, made and executed by Joseph W. Gould in writing, the said Joseph W. Gould assigned all his rights and benefits under and by the terms of [150] said policy to said Effie J. Dunlevy in words and figures following, to wit:

“For value received I hereby assign and transfer unto Effie J. Gould of Pittsburgh, Pa., the policy of insurance known as No. 305,011 issued by the New York Life Insurance Company upon the life of Joseph W. Gould of Pittsburgh, Pa., and all dividend, benefit and advantage to be had or derived therefrom subject to the conditions of the said policy, and to the rules and regulations of the company.

Witness my hand and seal this 27th day of June, 1893.

(Signed) JOSEPH W. GOULD.”

State of Pennsylvania,
County of Allegheny,—ss.

“On this 27th day of June, 1893, before me, personally came Joseph W. Gould, to me known to be the individual described in, and who executed the

foregoing assignment, and acknowledged that he executed the same.

(Signed) HENRY C. RYAN,
Notary Public."

"The New York Life Insurance Company, in accordance with its rules as stated below, has retained the duplicate of this assignment.

(Signed) JOHN A. McCALL,
President.
Per E. LAWES."

New York, June 30th, 1893.

That said assignment was delivered to the New York Life Insurance Company on the 30th day of June, 1893, and the said New York Life Insurance Company made and executed a certain instrument in writing as follows, to wit:

"The New York Life Insurance Company in accordance with its rules as stated below, has retained the duplicate of this assignment." [151]

In the Court of Common Pleas No. 4 of Allegheny County, Pa.

No. 253—First Term, 1910.

BOGGS & BUHL, INCORPORATED,

vs.

EFFIE J. DUNLEVY.

Acceptance of Service of Notice, Petition, and Order of Court by L. B. D. Reese, Esq., Attorney for Joseph W. Gould, Garnishee.

To L. B. D. Reese, Esq.,

Attorney for Jos. W. Gould:

Please take notice that a rule to show cause why

Effie J. Dunlevy, Jos. W. Gould and Boggs & Buhl, Incorporated, should not interplead together for the purpose of ascertaining to which of said parties \$2,479.70 in the hands of the New York Life Insurance Company belongs, has been granted in the above-entitled case, returnable February 26, 1910.

GORDON & SMITH,

Attys. for New York Life Insurance Co.

And now February 7th, 1910, service of the above notice together with a copy of the petition and order of Court accepted.

L. B. D. REESE,

Attorney for Jos. W. Gould.

Filed March 1st, 1910. [152]

In the Court of Common Pleas No. 4 of Allegheny County, Pa.

No. 253—First Term, 1910.

BOGGS & BUHL, INCORPORATED,

vs.

EFFIE J. DUNLEVY.

Acceptance of Service of Notice, Petition, and Order of Court by S. H. Huselton, Esq., Attorney for Boggs & Buhl, Incorporated.

NOTICE.

To S. H. Huselton,

Attorney for Boggs & Buhl, Incorporated.

Please take notice that a rule to show cause why Effie J. Dunlevy, Jos. W. Gould and Boggs & Buhl, Incorporated, should not interplead together for

the purpose of ascertaining to which of said parties \$2,479.70, in the hands of the New York Life Insurance Company belongs, has been granted in the above-entitled case returnable February 26, 1910.

GORDON & SMITH,

Attys. for New York Life Insurance Co.

And now, Feb. 5th, 1910, service of the above notice together with a copy of the petition and order of Court accepted.

S. H. HUSELTON,

Attys. for Boggs & Buhl, Inc.

Filed March 1st, 1910. [153]

[Petition of Lincoln National Bank for Leave to Intervene in Boggs & Buhl vs. Dunlevy, and Order Thereon.]

In the Court of Common Pleas No. 4 of Allegheny County, Penna.

No. 253—First Term, 1910.

BOGGS & BUHL, INCORPORATED,

vs.

EFFIE J. DUNLEVY.

PETITION AND ORDER.

To the Honorable, the Judges of said Court:

The petition of the Lincoln National Bank, a corporation organized and existing under the laws of the United States, respectfully represents:

That on February 23, 1910, your petitioner sued out a writ of foreign attachment in assumpsit in the Court of Common Pleas No. 3 of Allegheny County, at No. 102 May Term, 1910, in which proceeding Effie J. Dunlevy, defendant above named,

was named as defendant and the New York Life Insurance Company was summoned as garnishee.

That on March 4, 1910, your Honorable Court made absolute the following rule:

ORDER.

“And now, to wit, February 5th, 1910, the foregoing petition of the New York Life Insurance Company, Garnishee, being presented in Open Court, upon consideration thereof and on motion of Gordon & Smith, attorneys for Petitioner, a rule is granted on Effie J. Dunlevy, Joseph W. Gould and Boggs & Buhl, Incorporated to show cause why they should not interplead together for the purpose of ascertaining to which of said parties the money in the hands of the New York Life Insurance Company belongs, and why said [154] Company should not be permitted when it is determined to whom the money ought to be paid, to pay said sum of Two Thousand Four Hundred Seventy-nine and 70/100 (\$2479.70) Dollars into court for the benefit of such person as shall appear to be entitled thereto. And it appearing that the said Effie J. Dunlevy is a resident of the State of California, it is hereby ordered and decreed that service of said rule upon Effie J. Dunlevy be by serving her personally with a copy of this petition and order, or by sending a copy of the same, by mail or registered mail, to her at her last known address.

Rule returnable the 26th day of February, 1910.

By the Court.”

That thereafter, to wit, on March —, 1910, the said garnishee, the New York Life Insurance Com-

pany, presented its petition to your Honorable Court, asking leave to pay into this court the said fund of \$2479.70, to abide the issue to be framed by the Court, to which petition the Lincoln National Bank, your petitioner consented.

That thereupon, to wit, on March —, 1910, your Honorable Court made the following order:

“ORDER.”

And now, to wit, March —, 1910, the foregoing petition of the New York Life Insurance Company, Garnishee, presented in open court, and it appearing that the consent of the Lincoln National Bank of Pittsburgh, and of Charles Elste, has been obtained, upon consideration thereof, and upon motion of Gordon & Smith, Attorneys for Petitioner, it is ordered adjudged and decreed that the New York Life Insurance Company be given leave to pay the sum of Two Thousand Four Hundred Seventy-nine and Seventy One-Hundredths (\$2479.70) Dollars into this court, to abide the result of the issues to be framed by the Court. [155]

Wherefore, your petitioner having consented to the payment of the said fund of \$2479.70, into this court, a portion of which fund is subject to the aforesaid foreign attachment, respectfully prays your Honorable Court for leave to intervene and to be made a party to the issue to be framed as aforesaid, and for such other and further relief as the nature of the case may require.

THE LINCOLN NATIONAL BANK,

By H. A. JOHNSTON, Cashier.

State of Pennsylvania,
County of Allegheny,—ss.

Before me, the undersigned authority, personally appeared H. A. Johnston, who being duly sworn according to law, deposes and says that he is cashier of The Lincoln National Bank, and its agent in this behalf, and that the facts set forth in the foregoing petition are true and correct.

H. A. JOHNSTON.

Sworn to and subscribed before me this 18 day of March, 1910.

HARRY M. WILLIS,
Notary Public.

My commission expires February 10, 1913.

My commission expires.

ORDER.

And now, to wit, March 19, 1910, the foregoing petition having been presented in open court, upon consideration thereof, on motion of Patterson Sterret & Acheson, attorneys for petitioner, leave is hereby granted to The Lincoln National Bank to intervene in the above entitled case, the said The Lincoln National Bank to be made a party to the issue to be framed between the parties lawfully claiming the fund of \$2479.70 heretofore paid into court [156] by the New York Life Insurance Company, garnishee, attorney for plaintiff being present and no objection.

By the Court.

Filed March 19, 1910. [157]

*In the Court of Common Pleas No. 4 of Allegheny
County, Pennsylvania.*

No. 253—First Term, 1910.

Feigned Issue.

BOGGS & BUHL,

vs.

EFFIE J. DUNLEVY.

Opinion [in Boggs & Buhl vs. Dunlevy].

SWEARINGEN, P. J.

This action was brought by Boggs & Buhl against Effie J. Dunlevy and a judgment was obtained. Thereupon an attachment in execution was issued and Joseph W. Gould and the New York Life Insurance Company were named as garnishees. Both Joseph W. Gould and Effie J. Dunlevy claimed the fund, which the New York Life Insurance Company admitted was in its hands. Upon petition of the New York Life Insurance Company for leave to pay the money into Court, a Rule and an Interpleader was made absolute and it was directed to pay the money, which it had, into court. A petition was then filed on behalf of Effie J. Dunlevy, praying that a feigned issue might be framed in which said Joseph W. Gould should be named as the plaintiff and she and all other parties should be named as defendants. It was objected by said Joseph W. Gould that Effie J. Dunlevy was the real claimant and that she should be named as the plaintiff in the Feigned Issue.

It appears from the record that, on January 24,

1889 said Joseph W. Gould obtained a policy of insurance upon his own life from the New York Life Insurance Company, in the sum of \$5,000.00 payable upon his death "to the insured's executors, administrators or assigns." The policy was upon the "Tontine Plan" [158] and matured January 22d, 1909. The proceeds of this policy are the subject of this controversy.

The policy always remained in the possession of said Joseph W. Gould and it still is in his possession. He paid all of the premiums as they fell due.

On June 27th, 1893, said Joseph W. Gould executed in duplicate an Assignment of said Policy of Insurance of Effie J. Gould. She subsequently marries a husband named Dunlevy, and she is the Effie J. Dunlevy who is the defendant in this proceeding. A duplicate copy of said assignment was given to the New York Life Insurance Company. The other duplicate copy was retained by Joseph W. Gould. It was never delivered to Effie J. Dunlevy (*nee* Gould).

In consequence of the foregoing, Effie J. Dunlevy claims said fund by virtue of said Assignment of said policy of insurance. On the other hand, Joseph W. Gould avers that he revoked the gift and that he is in possession of the policy. He therefore claims the fund, which is the proceeds of said policy.

It is not pretended that Effie J. Dunlevy paid any consideration for said assignment of said Policy of Insurance. If this be true, it would seem that she could only claim the policy and the proceeds thereof as a gift. In other words, she is not a purchaser, but is a volunteer. Whether or not the gift was exe-

cuted so as to render it valid and irrevocable can only be determined upon the trial. She therefore is the actor upon whom rests the burden of establishing her title. Hence she and those representing her interests in the fund must be named as plaintiff in the Feigned Issue and it is so ordered.

By the Court.

March 19, 1910. [159]

In the Court of Common Pleas No. 4 of Allegheny County, Penna.

No. 253—First Term, 1910.

Execution Attachment.

BOGGS & BUHL, INCORPORATED,

vs.

EFFIE J. DUNLEVY.

**Petition [of N. Y. Life Ins. Co. for Order Permitting
Payment of \$2,479.70 in Boggs & Buhl vs. Dun-
levy, and Order Thereon].**

To the Honorable, the Judges of Said Court:

The petition of the New York Life Insurance Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and one of the garnishees in the above-entitled execution attachment proceedings, respectfully represents:

That in the year 1910, to wit, on February 5th, your petitioner presented a petition to your Honorable Court, in which it disclaimed all interest in a certain fund of Two Thousand Four Hundred Seventy-nine and Seventy One-hundredths

(\$2,479.70) Dollars, the proceeds of its policy #305,011, and averred its readiness to make immediate payment of said fund to the party or parties lawfully entitled thereto, and in which it prayed for a rule on Effie J. Dunlevy, Joseph W. Gould and Boggs & Buhl, Incorporated, to show cause why they should not interplead together for the purpose of ascertaining to which of said parties the money in its hands belonged.

That in the year 1910, to wit, on March 4th, your Honorable Court made absolute the following Rule:

ORDER.

And now, to wit, February 5th, 1910, the foregoing petition of the New York Life Insurance Company, Garnishee, being presented in open court, upon consideration thereof and on motion of Gordon & Smith, attorneys for Petitioner, a rule is granted on Effie J. Dunlevy, [160] Joseph W. Gould and Boggs & Buhl, Incorporated, to show cause why they should not interplead together for the purpose of ascertaining to which of said parties the money in the hands of the New York Life Insurance Company belongs, and why said Company should not be permitted, when it is determined to whom the money ought to be paid, to pay said sum of Two Thousand Four Hundred Seventy-nine and 70/100 (\$2,479.70) Dollars into court for the benefit of such person as shall appear to be entitled thereto. And it appearing that the said Effie J. Dunlevy is a resident of the State of California, it is hereby ordered and decreed that service of said rule upon Effie J. Dunlevy be by serving her personally with a copy of this petition and

order, or by sending a copy of same, by mail or registered mail, to her at her last known address.

Rule returnable the 26th day of February, 1910.

By the Court.

That in the year 1910, to wit, on February 23d, the Lincoln National Bank of Pittsburgh sued out a writ of Foreign Attachment in Assumpsit in the Court of Common Pleas No. 3 of Allegheny County, at No. 102 May Term, 1910, in which proceeding Effie J. Dunlevy, the defendant above named, was named as defendant, and your petitioner, the New York Life Insurance Company, was summoned as Garnishee.

That in the year 1910, to wit, on February 23d, Charles Elste sued out a writ of Foreign Attachment in Assumpsit in the Court of Common Pleas No. 4 of Allegheny County, at No. 368, Second Term, 1910, in which proceeding Effie J. Dunlevy, the defendant above named, was named as defendant, and your petitioner the New York Life Insurance Company, was summoned as Garnishee.

That your petitioner has obtained the consent of the Lincoln National Bank of Pittsburgh, and Charles Elste, the plaintiffs respectively in the above referred to Foreign Attachment proceedings to pay said fund of Two Thousand Four Hundred Seventy-nine and [161] Seventy One-Hundredths (\$2,479.70) Dollars into court. The consent of said parties is in writing and is attached thereto, and made part of this petition.

Wherefore, your petitioner prays your Honorable Court to make an order permitting it to pay the

sum of Two Thousand Four Hundred Seventy-nine and Seventy One-Hundredths (\$2479.70) Dollars into this court, to abide the result of the Issue to be framed by the Court, and for such other and further belief as the nature of the case may require.

NEW YORK LIFE INSURANCE COM-
PANY.

By GORDON & SMITH,
Its Attorneys.

State of Pennsylvania,
County of Allegheny,—ss.

On this 9th day of March, A. D. 1910, before me, a notary public, personally appeared Allen T. C. Gordon, who being duly sworn according to law, deposes and says that he is one of the attorneys of the New York Life Insurance Company, the petitioner within named, and its agent in this behalf, and that the facts stated in the foregoing petition are true and correct.

ALLEN T. C. GORDON.

Subscribed and sworn to before me this 19th day of March, 1910.

[Seal]

CLARA I. HOUSTON,
Notary Public.

My commission expires Jan. 18, 1913. [162]

ORDER.

And now, to wit, March 19, 1910, the foregoing petition of the New York Life Insurance Company, garnishee, presented in open Court, and it appearing that the consent of the Lincoln National Bank of Pittsburgh and of Charles Elste, has been obtained, upon consideration thereof, and upon motion of

Gordon & Smith, Attorneys for Petitioner, it is ordered, adjudged and decreed that the New York Life Insurance Company be given leave to pay the sum of Two Thousand Four Hundred Seventy-nine and Seventy One-hundredths (\$2479.70) Dollars into this court, to abide the result of the issue to be framed by this Court.

By the Court. [163]

In the Court of Common Pleas No. 4 of Allegheny County, Pa.

No. 253—First Term, 1910.

BOGGS & BUHL, INCORPORATED,

vs.

EFFIE J. DUNLEVY.

Consent of the Lincoln National Bank of Pittsburgh.

And now, to wit, March 17th, 1910, comes Messrs. Patterson, Sterrett & Acheson, attorneys for and in behalf of the Lincoln National Bank of Pittsburgh, plaintiff in the suit instituted against Effie J. Dunlevy in the Court of Common Pleas No. 3 of Allegheny County at No. 102, May Term, 1910, and consent to the New York Life Insurance Company paying the sum of \$2479.70 into court to abide the result of the issue to be framed by the Court.

PATTERSON, STERRETT & ACHESON,
Attorneys for the Lincoln National Bank of Pittsburgh. [164]

In the Court of Common Pleas No. 4 of Allegheny County, Pa.

BOGGS & BUHL, INCORPORATED,

vs.

EFFIE J. DUNLEVY.

Consent of Charles Elste [in Boggs & Buhl vs. Dunlevy].

And now, to wit, March 17th, 1910, comes Levi Bird Duff, attorney for and in behalf of Charles Elste, plaintiff in the suit instituted against Effie J. Dunlevy in the Court of Common Pleas No. 4 of Allegheny County at No. 368, Second Term, 1910, and consents to the New York Life Insurance Company paying the sum of \$2479.70 into court, to abide the result of the issue to be framed by the Court.

LEVI BIRD DUFF,

Attorney for Charles Elste.

Filed March 19, 1910. [165]

In the Court of Common Pleas No. Four of Allegheny County.

No. 253—First Term, 1910.

Feigned Issue.

BOGGS & BUHL, INC., et al.

vs.

JOSEPH W. GOULD.

Order of Court Framing Issue and Directing Notice to Attachment Creditors [in Boggs & Buhl vs. Gould].

And now, to wit, May 3d, 1910, it is ordered that

the issue to be tried in this case shall be as follows, to wit:

Whether Joseph W. Gould made a valid gift of policy No. 305,011, issued to him by the New York Life Insurance Company, to Effie J. Gould, now Effie J. Dunlevy.

All attaching creditors of the said Effie J. Dunlevy who desire to intervene in this proceeding are required to do so as plaintiffs herein on fifteen (15) days' notice to the attorneys of record, and to file their statements of claim or demand within said period of fifteen (15) days.

By the Court.

Filed May 3d, 1910. [166]

In the Court of Common Pleas No. 4 of Allegheny County.

No. 253—First Term, 1910.

Feigned Issue.

No. 2, Second Term, 1910.

BOGGS & BUHL, INC., A. J. GOULD, and LINCOLN NATIONAL BANK, Intervenors,

vs.

JOSEPH W. GOULD.

Petition and Affidavit of Joseph W. Gould for an Order Directing the Prothonotary to Pay Him the Money Paid into Court by the New York Life Insurance Co., and Order of Court.

To the Honorable, the Judges of said Court:

The petition of Joseph W. Gould, the defendant above named, respectfully represents:

That on the 8th day of July, 1907, Boggs & Buhl,

Inc., obtained judgment against Effie J. Dunlevy (formerly Effie J. Gould) in the sum of \$537.76, and on the 10th day of November, 1909, the said Boggs & Buhl, Inc., caused an execution attachment to be issued on its said judgment and named the New York Life Insurance Company and Joseph W. Gould as garnishees therein.

That subsequently, to wit, on February 5th, 1910, the said New York Life Insurance Company presented its petition to your Honorable Court setting forth, *inter alia*, "That in the year 1889, to wit, on January 2d, said petitioner duly entered into a contract with Joseph W. Gould, one of the garnishees in the above entitled proceeding, by the terms of which contract petitioner insured the life of said Joseph W. Gould, as evidenced by policy number 305,011, which said policy provided, *inter alia*, for the distribution of certain benefits to the insured at the termination of the Tontine Period named therein, which benefits were in the form of a cash surrender value and amounted to the sum of \$2,-479.70." [167]

"That in the year 1893, to wit, June 27th, said Joseph W. Gould made and executed a certain instrument in writing purporting to be an assignment of said policy to his daughter, Effie J. Gould, now Effie J. Dunlevy. That on or about September 8th, 1909, the said Joseph W. Gould revoked said assignment and demanded of said Insurance Company that said cash surrender value of said policy, to wit, the sum of \$2479.70, be paid to him and not to the said Effie J. Dunlevy, *nee* Gould, and the said New York

Life Insurance Company, in its said petition, asked leave to pay said sum of money into Court for the benefit of such person or persons as would appear to be entitled thereto.”

On March 19th, 1910, your Honorable Court ordered, adjudged and decreed that the said New York Life Insurance Company be given leave to pay said sum of \$2479.70 into court to abide the result of the issue to be framed by the Court, and on March 21st, 1910, said sum was paid to the Prothonotary and receipted for by him, and after deducting his poundage therefrom, there remains the sum of \$2471 of said fund in the hands of Wm. B. Kirker, Prothonotary of said Court. On March 19th, 1910, your Honorable Court ordered that an issue be framed wherein the said Effie J. Dunlevy, *nee* Gould, or those representing her interest, being her creditors, in said fund, be named as plaintiff in said feigned issue and Joseph W. Gould named as defendant therein.

On May 3d, 1910, your Honorable Court ordered that the issue to be tried in said case be as follows: “Whether Joseph W. Gould made a valid gift of policy No. 305,011 issued to him by the New York Life Insurance Company Effie J. Gould, now Effie J. Dunlevy,” and further ordered that all attaching creditors of said Effie J. Dunlevy who desired to intervene in said proceeding were required to do so as plaintiffs therein on fifteen days’ notice to the attorneys of record, and to file their statement of claim or demand therein within the said period of fifteen days. [168]

That said notice was duly served on the attorneys

for all of the attaching creditors of said Effie J. Dunlevy on May 3d, 1910, and the said Boggs & Buhl, Inc., A. J. Gould and the Lincoln National Bank of Pittsburgh intervened in said feigned issue and filed their statement of claim, to which the said Joseph W. Gould filed answer and also a plea therein, and said feigned issue was placed on the issue docket for trial.

That on the 11th day of June, 1910, on petition of said Joseph W. Gould, by his attorney, L. B. D. Reese, and after due notice to all parties in interest, the Court ordered that said feigned issue be placed at the head of Trial List No. 7 of said Court for trial.

That on Friday, September 16th, 1910, said case was called for trial and placed on the weekly trial list to be taken up on Monday, the 19th day of September, 1910. That said case was called for trial on said 19th day of September, 1910, and on the same day a verdict was rendered for the defendant; and on September 24th, 1910, no motion having been made for a new trial, judgment was entered on said verdict.

That on the 26th day of September, 1910, notice was served on the attorneys of all of the above-named intervenors notifying them that an application will be made on Saturday morning, October 1st, 1910, at 9:30 o'clock, or as soon thereafter as the Court will hear the same, for an order directing Wm. B. Kirker, Esq., Prothonotary, to pay the money now in his hands, received from the New York Life Insurance Company as aforesaid, to Joseph W. Gould

or his attorney, unless an appeal was taken therein in the meantime; which said notice is hereto attached and made part hereof; and that no appeal has been taken in said proceedings.

Your petitioner therefore prays your Honorable Court for an order directing Wm. B. Kirker, Esq., Prothonotary, to pay the money now in his hands, received from the New York Life Insurance Company in said proceedings, to wit, the sum of \$2471, to Joseph W. [169] Gould, the defendant, or to his attorney, L. B. D. Reese, forthwith. And he will ever pray, etc.

JOSEPH W. GOULD.

State of Pennsylvania,
County of Allegheny,—ss.

Joseph W. Gould, being duly sworn according to law, deposes and says that the facts stated in the foregoing petition are true as he verily believes.

JOSEPH W. GOULD.

Sworn to and subscribed before me this 1st day of October, 1910.

WM. B. KIRKER,
Pro.

ORDER.

And now, to wit, October 1st, 1910, the within petition presented in open court, and upon consideration thereof the prayer of said petition is granted. And it is ordered, adjudged and decreed that Wm. B. Kirker, Esq., Prothonotary, pay to Joseph W. Gould, or to his attorney of record, L. B. D. Reese, forthwith the sum of Twenty-four Hundred and

Seventy-one (\$2471) Dollars, that being the amount received by said Prothonotary from the New York Life Insurance Company March 21st, 1910, less his poundage, viz., Eight Dollars and Seventy Cents (\$8.70) by virtue of an order of this Court dated March 19th, 1910. Said money having been paid to said Prothonotary by said Insurance Company and received by him in proceedings at No. 253 First Term, 1910, of this Court.

By the Court. [170]

In the Court of Common Pleas No. 4 of Allegheny County.

No. 253—First Term, 1910.

Feigned Issue No. 2, Second Term 1910.

BOGGS & BUHL, INC., and A. J. GOULD and
LINCOLN NATIONAL BANK, Interv-
nors,

vs.

JOSEPH W. GOULD.

Please take notice that an application will be made on Saturday morning, October 1st, 1910, at 9:30 o'clock, or as soon thereafter as the Court will hear the same, for an order directing Wm. B. Kirker, Esq., Prothonotary, to pay the money now in his hands received by him from the New York Life Insurance Company, per Order of Court in above-stated proceedings, to Joseph W. Gould, the defendant, or to his attorney, unless an appeal is taken

therein in the meantime.

L. B. D. REESE,

Attorney for Joseph W. Gould.

Pittsburgh, Sept. 26th, 1910.

To S. H. Huselton, Esq., Attorney for Boggs
& Buhl, Inc.

W. C. McClure, Esq., Attorney for A. J. Gould.

Patterson, Sterrett & Acheson, Attorneys for
Lincoln National Bank, Intervenors.

Service of above notice accepted this 26th Sept.,
1910.

S. H. HUSELTON,

For Boggs & Buhl.

W. C. McCLURE,

Atty. for A. J. Gould.

Service of within notice accepted this 26th day of
September, 1910.

PATTERSON, STERRETT & ACHESON,

Attys. for Lincoln National Bank.

Filed Oct. 1, 1910. [171]

**[Feigned Issue Docket Entries in Boggs & Buhl vs.
Gould.]**

*In the Court of Common Pleas No. Four of Alle-
gheny County, Penna.*

Feigned Issue Docket Entries.

Feigned Issue No. 2, Second Term, 1910.

No. 253—First Term, 1910.

BOGGS & BUHL, INC., A. J. GOULD and LIN-
COLN NATIONAL BANK, Intervenors,

vs.

JOSEPH W. GOULD.

April 1, 1910, afft. and statement filed. And now, May 3, 1910, it is ordered that the issue to be tried in this case shall be as follows: Whether Joseph W. Gould made a valid gift of policy No. 305,011 issued to him by the New York Life Insurance Co. to Effie J. Gould, now Effie J. Dunlevy, all attaching creditors of said Effie J. Dunlevy, who desire to intervene in this proceeding, are required to do so as plaintiffs herein, on fifteen (15) days notice to the attorneys of record, and to file their statements of claim or demand within said period of fifteen (15) days. May 3, 1910, notice of above order served on Levi Bird Duff, atty. for Charles Elste, Patterson, Sterrett & Acheson, attys. for Lincoln National Bank, S. H. Huselton, atty. for Boggs & Buhl, Robert T. Watt, atty. for Pgh. Bank for Savings, W. C. McClure, atty. for A. J. Gould, Sarah B. Gould and Frank W. Taft. May 18, 1910, afft. and statement of A. J. Gould filed. May 19, 1910, afft. and statement of Lincoln National Bank of Pittsburgh filed. And now, May 21, 1910, it is ordered that within statement be marked refiled. June 6, 1910, answer of Joseph W. Gould filed. June 7, 1910, plea filed. June 11, 1910, praecipe for issue filed. And now, June 11, 1910, it is ordered that above case be placed at the head of trial list No. 7 for trial. Sept. 19, 1910, on trial list and jury sworn *Eo Die* verdict for the defendant. Sept. 24, 1910, sheriff's receipt paid by defts. atty. for verdict fee filed and judgment on the verdict. [172]

(Signed) JOHN A. McCALL,
 President.
 Per E. LAWES."

That at the time the said assignment was made by the said Joseph W. Gould, the said Effie J. Dunlevy was of the age of — years, and resided with her father, the said Joseph W. Gould, at that time, and for a long time subsequent thereto, to wit, up to the time of her marriage with Richard M. Dunlevy.

That subsequent to the assignment aforesaid the said Joseph W. Gould ratified the said assignment, and informed his daughter and others of said assignment, and stated that the proceeds of said policy were to go to his daughter, Effie J. Dunlevy.

Wherefore by virtue of the foregoing assignment, duly made, executed and delivered by the defendant Joseph W. Gould, as herein set forth, all the rights and benefits of the fund as aforesaid are now the property of Effie J. Dunlevy, and by reason thereof the claimant herein, A. J. Gould, claims of the said estate the amount as may appear by liquidation of the judgment in his attachment execution, all of which he expects to prove upon the trial of this cause.

W. C. McCLURE,
Attorney for A. J. Gould, Claimant.

State of Pennsylvania,
County of Allegheny,—ss.

Personally appeared before me, the undersigned authority, A. J. Gould, who being duly sworn according to law deposes and says, that the statements herein contained in so far as the same are within his knowledge, are true, and that so far as they are derived from information from others, he believes them to be true.

A. J. GOULD. [173]

Sworn to and subscribed before me this 16th day of May, 1910.

[Seal]

W. C. McCLURE,
Notary Public.

My commission expires January 18, 1913.

Filed May 18, 1910. [174]

*In the Court of Common Pleas No. 4 of Allegheny
County, Penna.*

No. 253—First Term, 1910.

BOGGS & BUHL, INCORPORATED,

vs.

EFFIE J. DUNLEVY.

**Statement of Claim of the Lincoln National Bank
of Pittsburgh.**

The Lincoln National Bank of Pittsburgh, an attaching creditor of Effie J. Dunlevy, having, by order of Court entered March —, 1910, been granted leave to intervene in the above-entitled case as party plaintiff, makes the following statement of claim:

That at No. 102 May Term, 1910, of the Court of Common Pleas No. 3 of Allegheny County, the Lincoln National Bank of Pittsburgh, this claimant brought a suit in foreign attachment against the said Effie J. Dunlevy, a nonresident of Pennsylvania, formerly Effie J. Gould, and now intermarried with R. M. Dunlevy, which said record is hereby referred to and made part hereof and attached hereto, and made part hereof marked Exhibit "A," is a copy of the statement of claim filed at said number and term; that the Court has ordered that said Effie J. Dunlevy, together with all attaching creditors who

may wish to intervene, shall be plaintiffs and Joseph W. Gould shall be defendant, to determine the issue as to whether Joseph W. Gould made a valid gift of policy No. 305,011, issued by the New York Life Insurance Company to Effie J. Gould, now Effie J. Dunlevy; that the said Joseph W. Gould is the father of said Effie J. Gould, now Effie J. Dunlevy; that on or about January 22, 1889, the New York Life Insurance Company issued a policy of life insurance on the life of the said Joseph W. Gould, said policy being No. 305,011 and said policy was to mature at the end of twenty years from its date, that is to say, at the expiration of [175] twenty years from January 22, 1889, there would become due and payable on said policy the sum of \$2479.70.

That on or about June 27, 1893, the said Joseph W. Gould made an assignment in writing of said policy, by virtue of which he assigned all of his right and all the benefits under said policy to his said daughter, Effie J. Gould, now Effie J. Dunlevy, said assignment was as follows, namely:

“For value received, I hereby assign and transfer unto Effie J. Gould of Pittsburgh, Pa., the policy of insurance, known as No. 305,011, issued by the New York Life Insurance Company upon the life of Joseph W. Gould of Pittsburgh, Pa., and all dividends and benefit and advantage to be had or derived therefrom, subject to the conditions of the said policy and under the rules and regulations of the company.

Witness my hand and seal this 27th day of June,

one thousand eight hundred and ninety-three.

(Signed) JOSEPH W. GOULD."

—and said assignment was duly acknowledged by Joseph W. Gould before Henry C. Ryan, a notary public, who attached his certificate of acknowledgment thereto, and said assignment was, on or about June 30, 1893, delivered to the New York Life Insurance Company, and the said company issued a certain writing as follows:

"The New York Life Insurance Company in accordance with its rules as stated above has retained a duplicate of this assignment.

(Signed) JOHN A. McCALL,
President.
Per E. LAWES."

That the said Effie J. Gould, to whom said assignment was made, was subsequently intermarried with R. M. Dunlevy, and is the defendant in the foreign attachment proceeding, above referred to; that the said Effie J. Gould, now Effie J. Dunlevy, by virtue [176] of said assignment, became the beneficiary under said policy and was such beneficiary on January 22, 1899, on which date there became due, under the terms and conditions of said policy, to her the sum of \$2,479.70, which sum the New York Life Insurance Company has paid into court.

That the said Effie J. Dunlevy is entitled to receive said proceeds of said policy of insurance, subject to the rights of the attaching creditors, and this claimant, as an attaching creditor of said Effie J. Dunlevy, claims so much of said sum so paid into

court as aforesaid as may be sufficient to satisfy its claim with costs.

THE LINCOLN NATIONAL BANK OF
PITTSBURGH.

By H. A. JOHNSTON,
Cashier.

State of Pennsylvania,
County of Allegheny,—ss.

Before me, the undersigned authority, personally appeared H. A. Johnston, cashier of the Lincoln National Bank of Pittsburgh, who being duly sworn according to law deposes and says that the averments contained in the foregoing statement of claim are true and correct, as he is informed and believes and expects to be able to prove upon the trial of this case.

H. A. JOHNSTON.

Sworn to and subscribed before me this 18th day of May, 1910.

[Seal]

M. D. ULLERY,
Notary Public.

My commission expires:

My commission expires January 19th, 1911.

[177]

EXHIBIT "A."

*In the Court of Common Pleas No. 3 of Allegheny
County, Penna.*

No. 102—May Term, 1910.

THE LINCOLN NATIONAL BANK OF PITTS-
BURGH, a Corporation,

vs.

EFFIE J. DUNLEVY, a Nonresident of Pennsyl-
vania, Formerly EFFIE J. GOULD, and
now Intermarried with R. M. DUNLEVY.

STATEMENT OF CLAIM.

The Lincoln National Bank of Pittsburgh, the above-named plaintiff, brings this suit against Effie J. Dunlevy, formerly Effie J. Gould, and now intermarried with R. M. Dunlevy, the above-named defendant, a nonresident of the State of Pennsylvania, upon a cause of action whereof the following is a statement:

The plaintiff, since a date prior to August 16, 1907, has been and still is a national banking association, under the laws of the State of Pennsylvania, having its principal place of business in the City of Pittsburgh, Pennsylvania.

On August 16, 1907, the said Effie J. Dunlevy, defendant above named, made and executed a certain check in writing, a true copy of which is as follows:

Pittsburgh, Pa., Aug. 16, 1907.

THE MARINE NATIONAL BANK,
Smithfield Street & Third Avenue,

Pay to the order of R. M. Dunlevy \$175.00 One
Hundred and Seventy-five no/100 Dollars.

Endorsed: EFFIE J. DUNLEVY.

R. M. DUNLEVY.”

The said check, made to the order of R. M. Dunlevy as [178] aforesaid in the sum of \$175 was then and there endorsed by R. M. Dunlevy and delivered to the plaintiff, and the plaintiff cashed the same, paying to the said R. M. Dunlevy the sum of \$175 called for by the check. The said check was duly presented for payment at the Marine National Bank, upon which it was drawn but payment thereof was refused for the reason that there was not sufficient funds in said bank to the credit of the maker with which to pay said check. The payment of said check has been repeatedly demanded from the said defendant, but she has neglected and refused to pay the same, and no interest has ever been paid on the same, and the plaintiff therefore claims of the defendant the sum of \$175 with interest thereon from August 16, 1907. There are no credits, setoffs or counterclaims of any kind, and said sum of \$175 with interest aforesaid is wholly and justly due, owing and unpaid.

Wherefore plaintiff brings this suit.

THE LINCOLN NATIONAL BANK OF
PITTSBURGH.

By H. A. JOHNSTON.

State of Pennsylvania,
County of Allegheny,—ss.

Before me, the undersigned authority, personally appeared H. A. Johnston, who being duly sworn according to law deposes and says that he is cashier of The Lincoln National Bank of Pittsburgh, plaintiff above named, and makes his affidavit in its behalf, and that the averments set forth in the foregoing statement are true and correct, as he verily believes and expects to be able to prove upon the trial of this case.

H. A. JOHNSTON.

Sworn to and subscribed before me this —— day
of February, 1910.

Notary Public.

My com. expires:

Filed May 19, 1910. [179]

In the Court of Common Pleas No. Four of Allegheny County.

No. 253—First Term, 1910.

No. 2 Feigned Issue.

BOGGS & BUHL, INC., et al.,

vs.

JOSEPH W. GOULD.

**Answer of Joseph W. Gould [to Statements of
Claim in Boggs & Buhl vs. Gould].**

Joseph W. Gould, the defendant above named, by
L. B. D. Reese, his attorney, comes and makes an-

swer to the several statements of claim filed in the above stated case and says that the said several plaintiffs in said action named ought not to have and maintain their said action against the defendant for the following reasons, viz:

1. The defendant, Joseph W. Gould, did not make a valid gift of policy No. 305,011, issued to him by the New York Life Insurance Company to Effie J. Gould, now Effie J. Dunlevy.

2. The defendant, Joseph W. Gould, never delivered said policy of insurance nor the assignment thereof to Effie J. Gould now Effie J. Dunlevy, but retained both said policy and the assignment thereof from the time said policy was issued and said assignment was made, up to the present time, and paid all premiums on said policy maturing after the date of said assignment.

3. The defendant, Joseph W. Gould, never delivered said policy nor the assignment thereof, but retained possession thereof for the purpose of revoking the same should he be living at the time all premiums on said policy were paid so that he might receive the cash surrender value thereof; and the said defendant did revoke said assignment after all premiums on said policy had been paid and notified the said Insurance Company to pay the cash surrender value thereof to him and not to the said Effie J. Gould now Effie J. Dunlevy. [180]

At the time of making an assignment of said policy to the said Effie J. Gould, it was his intention that she should have the benefit thereof in case of his death before the arrival of the Tontine Period

thereof; it being his further intention that, if living at the time when all premiums were paid on said policy, to receive the cash surrender value thereof himself. And that he never intended that the said Effie J. Gould, now Effie J. Dunlevy, should receive any moneys on said policy except in the event of his death before all of the premiums on said policy had been paid.

4. The defendant, Joseph W. Gould, never ratified the assignment of said policy by word or deed, and denies the allegation contained in the statement of claim filed in the above case by A. J. Gould "that subsequent to the assignment aforesaid, the said Joseph W. Gould ratified the said assignment and informed his daughter and others of said assignment and stated that the proceeds of said policy were to go to his daughter, Effie J. Dunlevy."

5. The said assignment of said policy as set forth in the several statements filed by the several plaintiffs in the above action was a voluntary act of the defendant, Joseph W. Gould, without consideration, and was subject to his power of revocation, and said defendant did revoke said assignment after all the premiums thereon were paid and before any payments under said assignment had been made to the said Effie J. Dunlevy.

6. The assignment set forth in plaintiffs' several statements of claim is invalid for want of delivery.

7. The defendant, Joseph W. Gould, is advised that the indebtedness of the said Effie J. Gould, now Effie J. Dunlevy, to the said A. J. Gould is less than three hundred dollars (\$300) and the judgment

confessed by the said Effie J. Dunlevy to the said A. J. Gould, upon which his right to interplead in this case is [181] founded, is fraudulent and void in any amount in excess of about Two hundred Dollars (\$200).

The said Effie J. Gould, now Dunlevy, had no knowledge of the absolute assignment of said policy to her until notified by the New York Life Insurance Company after the payment of the last premium due thereon by the defendant, Joseph W. Gould, which said notice was given her before defendant revoked said assignment.

JOSEPH W. GOULD,
By L. B. D. REESE,
His Attorney.

June 6th, 1910 (filed). [182]

In the Court of Common Pleas No. 4 of Allegheny County.

No. 253—First Term, 1910.

No. 2 Feigned Issue.

BOGGS & BUHL, INC., et al.,

vs.

JOSEPH GOULD.

Plea [of Joseph W. Gould in Boggs & Buhl vs. Gould].

And now, June 7th, 1910, comes Joseph W. Gould, the defendant above named, by L. B. D. Reese, his attorney, and for a plea in the issue in this behalf says, that the right and title to the fund paid into court by the New York Life Insurance Company on

policy No. 305,011 is not in Effie J. Gould, now Effie J. Dunlevy, or in the plaintiffs as set out in their statements of claim or declarations, but that said fund belongs to, and is the property of, this defendant.

And for a further plea defendant says that no valid gift of said policy No. 305,011, issued to him by the said New York Life Insurance Company was ever made to said Effie J. Gould, now Effie J. Dunlevy, in that said policy nor the assignment thereof was ever delivered to her.

And for a further plea in this behalf, defendant pleads the matters set forth in his answer to the plaintiffs' statements of claim or declarations.

JOSEPH W. GOULD,

By L. B. D. REESE, His Atty.

Filed June 7th, 1910. [183]

In the Court of Common Pleas No. 4 of Allegheny County.

No. 253—First Term, 1910.

No. 2 Feigned Issue.

BOGGS & BUHL, Incorporated, et al.,

vs.

JOSEPH GOULD.

Notice of Application to Have Case Placed at Head of Trial List No. 7th for Trial [in Boggs & Buhl vs. Gould].

Please take notice that an application will be made in above stated case on Saturday morning, June 11th, 1910, at 9:30 o'clock or as soon thereafter as the Court will hear the same, for an order direct-

ing that said case shall be placed at the head of Trial List No. 7 of said Court for trial.

L. B. D. REESE,
Attorney for Defendant.

Pittsburgh, June 7th, 1910.

Service of the within notice accepted this 7th day of June, 1910.

W. D. McCLURE,
Atty. for A. J. Gould.
S. H. HUSELTON,
Atty. for Boggs & Buhl.

PATTERSON, STERRETT & ACHESON,
Attys. for Lincoln Nat. Bank. [184]

Wm. B. Kirker Esq.,
Pro.

Please put above case on Issue Docket.

L. B. D. REESE,
Atty. for Deft.

Filed June 11th, 1910. [185]

*In the Court of Common Pleas No. 4 of Allegheny
County.*

No. 253—First Term, 1910.

No. 2 Feigned Issue.

BOGGS & BUHL, INC., et al.,
vs.

JOSEPH GOULD,

**Petition to Have Issue Placed at Head of Trial List
No. 7 [in Boggs & Buhl vs. Gould].**

To the Honorable, the Judges of said Court:

The petition of Joseph W. Gould, the defendant

above named, by L. B. D. Reese, his attorney, respectfully represents:

That some time prior to November 10th, 1909, Boggs & Buhl, Inc., obtained judgment against Effie J. Dunlevy (formerly Effie J. Gould), and on the said 10th day of November, 1909, the said Boggs & Buhl, Inc., caused an execution attachment to be issued on its said judgment and named the New York Life Insurance Company and Joseph W. Gould as garnishees therein.

That subsequently, to wit, on February 5th, 1910, the said New York Life Insurance Company presented its petition to your Honorable Court, setting forth, *inter alia*, "That in the year, 1889, to wit, on January 22d, said petitioner duly entered into a contract with Joseph W. Gould, one of the garnishees in the above-entitled proceeding, by the terms of which contract petitioner insured the life of the said Joseph W. Gould, as evidenced by policy No. 305,011, which said policy provided, *inter alia*, for the distribution of certain benefits to the insured at the termination of the Tontine Period named therein, which benefits were in the form of a cash surrender value and amounted to the sum of \$2479.70."

"That in the year 1893, to wit, June 27th, the said Joseph W. Gould made and executed a certain instrument in writing purporting to be an assignment of said policy to his daughter, Effie [186] J. Gould, now Effie J. Dunlevy."

That on or about September 8th, 1909, the said Joseph W. Gould revoked said assignment and de-

manded of said Insurance Company that said cash surrender value of said policy, to wit, the sum of \$2479.70, be paid to him and not to the said Effie J. Dunlevy (*nee* Gould), and said New York Life Insurance Company, in its said petition, asked leave to pay said sum of money into court for the benefit of such person or persons as would appear to be entitled thereto.

On March 19th, 1910, your Honorable Court ordered, adjudged and decreed that the said New York Life Insurance Company be given leave to pay said sum of \$2479.70 into court to abide the result of the issue to be framed by the Court, and on March 21st, 1910, said sum was paid to the Prothonotary and receipted for by him, and after deducting his poundage therefrom, there remains the sum of \$2471 of said fund in court.

On March 19th, 1910, your Honorable Court directed that an issue be framed wherein the said Effie J. Dunlevy (*nee* Gould), and those representing her interest, being her creditors, in said fund be named as plaintiff in said Feigned Issue and Joseph W. Gould named as the defendant therein.

On May 3d, 1910, your Honorable Court ordered that the issue to be tried in said case be as follows: "Whether Joseph W. Gould made a valid gift of policy No. 305,011, issued to him by the New York Life Insurance Company, to Effie J. Gould, now Effie J. Dunlevy," and further ordered that all attaching creditors of said Effie J. Dunlevy who desired to intervene in said proceeding were required to do so as plaintiffs therein on fifteen days' notice

to the attorneys of record, and to file their statements of claim or demand therein within said period of fifteen days.

That said notice was duly served on the attorneys for all judgment creditors of the said Effie J. Dunlevy on May 3d, 1910, [187] and all who desired, have intervened in said Feigned Issue and an answer to said statements or declarations has been filed by the said Joseph W. Gould, and he has also filed a plea therein, and said Feigned Issue can now be placed on the Issue Docket for Trial.

That under the rules of Court the said Feigned Issue must be placed on the Issue Docket as other causes; and if the said cause is so placed on the Issue Docket, it will be at least two years before a trial thereof can be reached, and the fund hereinbefore recited in the hands of the Court will remain undisturbed for at least that length of time, which will be a hardship on whoever may be entitled to receive the same.

Your petitioner avers that he is entitled to said fund and therefore prays your Honorable Court that said Feigned Issue be placed at the head of Trial List No. 7 of your Honorable Court for trial, so that he may receive said fund or it may be determined as nearly as possible to whom the same is to be paid.

And he will ever pray, etc.

JOSEPH W. GOULD,

By L. B. D. REESE,

His Atty.

State of Pennsylvania,
County of Allegheny,—ss.

L. B. D. Reese, being duly sworn according to law, deposes and says that the facts stated in the foregoing petition are true as he verily believes, and that he makes this petition on behalf of Joseph W. Gould, who is now in the State of Idaho.

L. B. D. REESE,

Sworn to and subscribed before me this 10th day of June, 1910.

[Seal]

ALICE E. DUFF,

Notary Public.

My commission expires January 21, 1911. [188]

And now, to wit, June 11th, 1910, the within petition presented in open court, and it appearing to the Court that all parties in interest have received notice of this application, it is now ordered that William B. Kirker, the Prothonotary of this Court, place the above-stated Feigned Issue at the head of Trial List No. 7 of this Court for trial.

By the Court.

Filed June 11th, 1910. [189]

In the Court of Common Pleas No. 4 of the County of Allegheny, Pa.

No. 253—First Term, 1910.

Feigned Issue No. 2. Second Term, 1910.

BOGGS & BUHL, INC., A. J. GOULD and LINCOLN NATIONAL BANK, Intervenor,

versus

JOSEPH W. GOULD.

Verdict.

And now, to wit, Sept. 19th, 1910, we, the Jurors empanelled in the above-entitled case find verdict for defendant.

[Endorsed]: No. 253—First Term 1910. Feigned Issue No. 2, 2d T., 1910. Boggs & Buhl, Inc., A. J. Gould and Lincoln National Bank, Intervenors, versus Joseph W. Gould. Jury Sworn. Verdict. Filed Sept. 19th, 1910. Wm. B. Kirker, Prothonotary. [190]

Pittsburgh, Sept. 24, 1910.

RECEIVED from L. B. D. Reese FOUR DOLLARS, Verdict Fee, in the case of Boggs & Buhl, Inc., at al. vs. Jos. W. Gould, being No. 253 of First Term, A. D. 1910.

JUDD H. BRUFF,
Sheriff.

[Endorsed on face]: Allegheny County. [Endorsed on back thereof]: No. 253—1st Term, 1910. F. I. 2. Boggs & Buhl, Lincoln Nat. Bank vs. Jos. W. Gould. Filed Sept. 24, 1910. [191]

**[Certificate to Record in Boggs & Buhl vs.
Dunlevy.]**

Commonwealth of Pennsylvania,
Allegheny County,—ss.

I, Wm. B. Kirker, Prothonotary of the Court of Common Pleas No. Four in and for said county,
certify that the foregoing is a full
[Court Seal] and correct copy of the whole record
of the case therein stated, wherein

Boggs & Buhl, Plaintiff, and Effie J. Dunlevy, Defendant, as the same remains of record before the said Court at No. 777 of Third Term, A. D. 1907.

In Testimony Whereof, I have hereunto set my hand, and affixed the seal of the said Court, the 19th day of December, A. D. 1910.

WM. B. KIRKER,
Prothonotary.

Allegheny County,—ss.

I, Joseph M. Swearingen, President Judge of the Court of Common Pleas No. Four in and for said County, certify that Wm. B. Kirker, by whom the above attestation was made, was, at the date thereof, Prothonotary of said Court, duly qualified; and the said attestation is in due form of law, and made by the proper officer.

Witness my hand and seal the 19th day of December, A. D. 1910.

JOSEPH M. SWEARINGEN, [Seal]
P. J. [192]

Allegheny County,—ss.

I, Wm. B. Kirker, Prothonotary of the Court of Common Pleas No. Four for said
[Court Seal] County, certify that Hon. Jos. M. Swearingen, Esq., by whom the above certificate was given, and whose name is thereby subscribed in his own proper handwriting, was at the date thereof President Judge of the said Court, duly commissioned and sworn and acting.

In Witness Whereof, I have hereunto set my hand

194 *New York Life Insurance Company et al.*

and affixed the seal of said court, the 19th day of December, 1910.

WM. B. KIRKER,
Prothonotary.

[Endorsed on back thereof]: Boggs & Buhl
vs. Effie J. Dunlevy.

Exemplification of Record. At No. 777—Third
Term, 1907, from the Court of Common Pleas No.
Four, in and for the County of Allegheny, Penn-
sylvania.

Debt\$537.76

Int. from July 8th, 1907.

Allegheny Co. Costs..... 10.25

This Record 35.00

WILLIS F. McCOOK,
S. H. HUSELTON,

Att'y for Pl'ff. [193]

[Endorsed]: Filed Dec. 7, 1911. Southard Hoff-
man, Clerk. By W. B. Maling, Deputy Clerk.
[194]

*In the United States District Court, Northern Dis-
trict of California, Second Division.*

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation, and JOSEPH W. GOULD,
Defendants.

Stipulation Waiving Trial by Jury.

A trial by jury is hereby expressly waived in the above-entitled action.

FRANK W. TAFT,

CLARENCE COONAN,

NAT SCHMULOWITZ,

Attorneys for Plaintiff.

PAGE, McCUTCHEN, KNIGHT & OLNEY,

Attorneys for Defendants.

[Endorsed]: Filed May 16, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [195]

At a stated term, to wit, the March, A. D. 1913, of
the District Court of the United States of
America, in and for the Northern District of
California, Second Division, held at the court-
room in the City and County of San Francisco,
on Monday, the 10th day of March, in the year
of our Lord one thousand nine hundred and 13.
Present: The Honorable WILLIAM C. VAN
FLEET, District Judge.

No. 15,041.

EFFIE J. GOULD DUNLEVY

vs.

NEW YORK LIFE INS. CO. et al.

Order for Judgment.

This cause heretofore tried and submitted being
now fully considered and the Court having rendered

its opinion in writing, it was ordered, in accordance therewith, that Effie J. Gould Dunlevy, plaintiff, do have and recover of and from New York Life Insurance Company, a corporation, defendant the sum of \$3,195.70 and costs, and that the defendant, Joseph W. Gould, be and he hereby is debarred from participating in said sum of money or any part thereof. [196]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,041.

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation, and JOSEPH W. GOULD,
Defendants.

Judgment.

This cause having come on regularly for trial upon the 29th day of May, 1912, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation of the attorneys for the respective parties; Frank W. Taft, Esq., appearing as the attorney for the plaintiff and F. W. Boland, Esq., appearing on behalf of Messrs. Page, McCutchen, Knight & Olney, attorneys for the defendants; and evidence on behalf of the respective parties having been introduced and closed, and the cause having been submitted to the Court for con-

sideration and decision, and briefs having been filed, and the Court, after due deliberation, having ordered that judgment be entered herein in favor of plaintiff and against defendants and for costs:

Now, therefore, by virtue of the law and by reason of the premises, it is considered by the Court that Effie J. Gould Dunlevy plaintiff, do have and recover of and from New York Life Insurance Company, a Corporation, defendant, the sum of Three Thousand One Hundred Ninety-five and 70/100 (\$3,195.70) Dollars, together with her costs herein expended taxed at \$26.90, and it was further ordered that the defendant Joseph W. Gould be and he hereby is barred from participating in said sum of money or any part thereof. [197]

Judgment entered March 10, 1913.

W. B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

A True Copy, Attest:

[Seal]

W. B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed March 10, 1913. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[198]

*In the District Court of the United States for the
Northern District of California.*

No. 15,041.

EFFIE J. GOULD DUNLEVY,

vs.

NEW YORK LIFE INSURANCE CO.

Certificate to Judgment-roll.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 10th day of March, 1913.

[Seal]

W. B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed March 10th, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[199]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,041.

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation, and JOSEPH W. GOULD,
Defendants.

Opinion.

FRANK W. TAFT, CLARENCE COONAN, and
NAT SCHMULOWITZ, for Plaintiff.

PAGE, McCUTCHEN, KNIGHT & OLNEY, for
Defendant New York Life Insurance Company.

VAN FLEET, District Judge:

Plaintiff brings this action to recover \$2,479.70, the cash surrender value accrued under the tontine provisions of a policy of life insurance issued by the defendant insurance company on the life of its co-defendant Joseph W. Gould, the father of plaintiff, the policy being alleged to have been assigned by Gould to plaintiff.

The defenses of the insurance company are, (1) that there was no valid or perfected assignment of the policy to the plaintiff; and (2) that plaintiff is concluded by a judgment recovered against the company by its codefendant Gould on the same demand in the Court of Common Pleas of the State of Pennsylvania, under which judgment the amount

involved has been fully paid to the latter. The answer of the defendant Gould, while silent as to the judgment, sets up that the assignment counted on never became perfected for reasons that will be [200] hereafter noticed.

1. As to the validity of the alleged assignment: The policy was issued to Gould, then a resident of Pittsburgh, Pennsylvania, in 1889. In 1893, while his daughter, the plaintiff, was a child of thirteen years living with him and under his protection and maintenance, he went to the office of the local agent of the company and executed an assignment of the policy to her, absolute and unconditional in form, purporting to transfer to her "all dividend, benefit, and advantage to be had or derived therefrom." The assignment was executed in duplicate with all the formality required by the company, and acknowledged before a notary. As required by the rules of the company, both copies were sent to its home office in New York to be vised by the company before becoming effective; whereupon one copy was retained by the company and the other returned to Gould, who kept it, with the policy, in his possession, and thereafter continued to pay the premiums until the expiration of the tontine period and the payment to him of the amount due thereon as hereinafter stated, when it was surrendered to the company.

It is claimed that these facts fail to disclose a valid transfer of the policy for want of any delivery of the assignment and the policy to the plaintiff. If by this is meant that an actual physical delivery

of the documents was essential to complete the transaction, the claim is untenable. In the first place, the formal execution and sending of the assignment to the insurance company, although in obedience to the requirement of its rules, is presumptively for the benefit of the assignee, and as between the latter and the assignor, in the absence of anything to evince a contrary purpose, will be regarded as a sufficient delivery. *McDonough vs. Aetna Life Ins. Co.*, 78 N. Y. Supp. 217; *Hurlbutt vs. Hurlbutt*, 1 N. Y. Supp. 854. But, in the next place, no actual delivery was required under the [201] circumstances disclosed in this case because the assignee was incapable of receiving it. She was a minor under the care and protection of the assignor, her father, and the latter was therefore the natural custodian of her property and effects, as he was of her person. Under these circumstances no actual physical delivery was called for to perfect the title of the assignee. *Burges vs. New York Life Ins. Co.*, 53 S. W. 602. It is urged that the fact that Gould continued to pay the premiums on the policy is evidence that he did not regard the assignment as complete. This is without force. In making the assignment to his daughter, a minor, and so far as appears without estate, Gould knew that if the premiums were not paid by him they would not be paid at all, and the presumption will not be indulged that he entered upon the transaction with the purpose of doing a thing which would result in a forfeiture of all right under the policy for want of payment of the premiums. The presump-

tion will be preferred that in continuing to pay them it was his purpose to pay them for the benefit of his daughter.

The further claim that the assignment was a conditional one and never became effective is based upon the testimony of Gould that he had no intention to make an absolute assignment to his daughter; that he told the agent of the company, when he went to the office to execute it, that he wished to make it conditional upon his dying before the policy was paid, desiring to reserve to himself the right to collect anything to be paid on the policy at its maturity, should he be alive; that the agent instead drew the assignment in the absolute form and it was signed by him without reading it, relying on the assurance of the agent that it was all right. This evidence is not sufficient to defeat the plaintiff's title. There is no suggestion of fraud in the transaction. If his evidence is true, Gould might perhaps have maintained an action to have the [202] instrument reformed for mistake, but he has not done so and no such relief is asked or may be had in this action. I am satisfied that the transfer of Gould's rights under the policy was a complete and valid transaction, and that neither he nor the insurance company can successfully assail it here. It must be borne in mind that we are not dealing with a case like those relied on by the defendants, where the rights of creditors, or innocent third parties with superior equities, are involved, but are concerned only with the rights of the assignor and his assignee as between themselves.

2. Is plaintiff concluded by the judgment pleaded in bar?

The record discloses these facts: In 1907 Boggs & Buhl, a creditor of the plaintiff, the latter then residing in Pennsylvania, recovered a judgment against her in the Court of Common Pleas of Allegheny County in that State. That the Court obtained jurisdiction of this plaintiff in that case no question is made, due service being had upon her in accordance with the laws of Pennsylvania. In November, 1909, knowledge of the interest claimed by the plaintiff in the policy in suit having come to the judgment creditor, a writ of execution attachment issued on the judgment and was served upon the local agent of the defendant insurance company in that State and upon Joseph W. Gould, the other defendant here. At this time the plaintiff had removed from Pennsylvania to this State and taken up her residence here, and no service of the writ was had on her. Gould appeared in response to the garnishment, denying any assignment of the policy to the plaintiff here and alleging a sole right in himself to the amount due thereon. The insurance company also answered, admitting its indebtedness under the policy, but setting up that the fund was claimed by both Gould and this plaintiff, and prayed to be advised as to its rights. Other creditors of the plaintiff having levied garnishments upon the [203] insurance company against the fund, the latter filed a petition in the Court of Common Pleas asking leave to pay the money into Court, and praying that the several claimants be required to interplead and

have their respective rights determined. Leave was granted, the fund paid into the hands of the prothonotary, and thereafter, in February, 1910, the Court granted a rule as prayed requiring the several claimants to the fund to interplead for the purpose of determining their respective rights. It being made to appear that the plaintiff here was then a resident of California, the Court directed that the rule be served upon her here by delivery of a copy to her personally, which was done, but plaintiff did not appear. The other parties having appeared, the Court thereafter entered a rule that a feigned issue be framed and tried to determine whether Gould had made a valid gift of the policy to the plaintiff here. A trial of this issue was had before a jury, without the presence or appearance therein of the plaintiff, and the jury found that no assignment or gift of the policy had been made to plaintiff. Upon this verdict the Court of Common Pleas entered its order or judgment directing the prothonotary to pay over the fund to Joseph W. Gould, and held that neither the plaintiff here nor her creditors had any right therein. This is the adjudication upon which the defendant company relies as a bar to plaintiff's recovery.

I think it quite obvious that this judgment in no wise concludes plaintiff's rights involved in this case. The Court of Common Pleas, by virtue of the existence upon its records of a valid unsatisfied judgment against the plaintiff, undoubtedly acquired jurisdiction by its garnishee process to determine as between plaintiff and her creditors the rights of the

latter to subject to the satisfaction of their judgment any debt due plaintiff, or other property of hers in Pennsylvania, to the extent of such judgment (*Louisville etc. Ry. Co. vs. Deer*, 200 U. S. 176; *Harris vs. Balk*, 198 U. S. 215; *Pennoyer vs. Neff*, 95 [204] U. S. 714;) but I regard it as equally certain that that Court was without jurisdiction to proceed, without the personal presence of the plaintiff, to try the question of the rights of plaintiff in the policy in suit as between her and Gould and the insurance company. The proceeding of interpleader at the instance of the insurance company, in which the feigned issue stated was sought to be tried, was in this respect quite independent of the proceeding on garnishment. (*Ruff vs. Ruff*, 85 Pa. St. Rep. 333.) As to the former, the Pennsylvania court was without jurisdiction of the person of the plaintiff, since the method of service upon her was wholly ineffectual for the purpose,—a proposition so thoroughly settled that the authorities need not be referred to. A Court must, to render an effectual judgment, have jurisdiction either of the person of the defendant or the *res*. (*Pennoyer vs. Neff*, *supra*.) The judgment of the Court of Common Pleas itself determines that it had no jurisdiction of the latter, since it is adjudged that the debt levied upon and which alone *would it* jurisdiction was not the debt of plaintiff but of a third party as against whom the creditors of plaintiff had no rights.

I am satisfied, therefore, that it must be held that the judgment pleaded is not conclusive upon the

plaintiff and constitutes no bar to a recovery on the policy.

Judgment must accordingly go in favor of plaintiff for the amount sued for, with interest and costs, as prayed.

[Endorsed]: Filed March 10, 1913. W. B. Mal-
ing, Clerk. [205]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,041.

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation, and JOSEPH W. GOULD,
Defendant.

Engrossed Bill of Exceptions.

BE IT REMEMBERED that, on the 29th day of May, 1912, at a stated term of the District Court of the United States, for the Northern District of California, Second Division, the above-entitled case came on for trial before the Honorable William C. Van Fleet, District Judge, presiding, the defendant New York Life Insurance Company, a corporation, being represented by Messrs. Page, McCutchen, Knight & Olney, and the plaintiff being represented by Frank W. Taft, Esq., Clarence Coonan, Esq., and Nat. Schmulowitz, Esq., and thereupon the following proceedings were had:

A trial by jury was duly waived in writing by each of said parties, and the said written waiver was

filed with the clerk of the above-entitled court and is now on file herein.

A stipulation as to the facts of said case was entered into between said parties, said stipulation having been reduced to writing and signed by counsel for each of said parties, and said stipulation so signed was filed herein and is now on file in this action, and was and is in the following words and figures to wit:

“[Title of Court and Cause.]

Stipulation [of Facts].

STIPULATION.

To save the expense of taking depositions, and for the [206] purposes of trial in the above-entitled action, it is hereby stipulated and agreed by and between the plaintiff and defendant New York Life Insurance Company, as follows:

I.

IT IS HEREBY STIPULATED AS FACTS:

That defendant New York Life Insurance Company, on or about the 24th day of January, 1889, executed a policy of insurance on the life of defendant Joseph W. Gould, which said policy is set forth in Exhibit ‘A’ to the amended answer of the defendant New York Life Insurance Company, on file herein, and delivered the same to him.

That on or about the 27th day of June, 1893, defendant Joseph W. Gould, the assured in said policy, signed the instrument, a correct copy of which is set forth on pages 44 and 45, in Exhibit ‘A’ to the amended answer of defendant New York Life Insurance Company:

That said policy remained in the possession of defendant Joseph W. Gould, the assured mentioned therein, and was never delivered to plaintiff herein; that said instrument, hereinbefore mentioned and set forth on pages 44 and 45 of said Exhibit 'A' to defendant New York Life Insurance Company's amended answer herein, was not, nor was any copy thereof, ever delivered to the plaintiff herein, but a copy of the same was delivered to defendant New York Life Insurance Company; that the notice attached to the said instrument contains a statement of the rules of defendant New York Life Insurance Company in force at the time of the signing thereof, and defendant New York Life Insurance Company executed the receipt therefor, as set forth on page 44 of Exhibit 'A' to the amended answer of defendant New York Life Insurance Company as follows:

“ ‘The New York Life Insurance Company, in accordance with its rules, as stated below, has [207] retained the duplicate of this assignment.

JOHN A. McCALL, Pres.

Per LAWES.’

That the premiums, due to defendant New York Life Insurance Company on said policy were duly and regularly paid.

That R. H. McCreary, mentioned in the testimony of defendant Joseph W. Gould, was, on or about the 27th day of June, 1893, the agent of defendant New York Life Insurance Company, and the person referred to by said defendant Joseph W. Gould in his testimony;

That on, prior to, and after November 11, 1909, de-

defendant New York Life Insurance Company was authorized to do, and doing, a life insurance business in the State of Pennsylvania, and the insurance commissioner of the State of Pennsylvania had theretofore issued to defendant New York Life Insurance Company, and there was then outstanding in full force, effect and virtue, and said defendant New York Life Insurance Company was the holder of, a certificate of authority, showing that it was authorized to transact business in said State of Pennsylvania; that at said last mentioned times F. W. Hubbard, mentioned in said Exhibit 'A' to defendant New York Life Insurance Company's said amended answer, was an agent, to wit, cashier, of defendant New York Life Insurance Company, at its office in Allegheny County, State of Pennsylvania; and said F. W. Hubbard was on, prior to, and after November 11, 1909, the person appointed by defendant New York Life Insurance Company, in its behalf, in conformity with the laws of the State of Pennsylvania, to receive service of process, including a writ of execution attachment issued under or by authority of the laws of the State of Pennsylvania. That the exemplification of record annexed to defendant New York Life Insurance Company's amended answer herein, and marked Exhibit 'A,' is a full, complete and correct exemplification of the [208] entire record of all proceedings had in the courts of the State of Pennsylvania with reference to the policy of life insurance and the moneys involved in the above-entitled action.

II.

IT IS HEREBY STIPULATED AND AGREED

that defendant Joseph W. Gould would, if called as a witness in the above-entitled action, testify as follows, to wit, and either of the parties hereto may read such testimony in evidence at the trial of the above-entitled action, subject to any legal objection as to the competency, materiality, or relevancy thereof, or any part thereof, but not subject to any objection as to the form of the statement:

Stipulated [Testimony of Joseph W. Gould, the Defendant].

I am one of the defendants in the above-entitled action, and the assured mentioned in that certain policy of life insurance issued by defendant New York Life Insurance Company on or about the 24th day of January, 1889, and numbered 305,011, and described in the complaint of plaintiff herein. On or about the 27th day of June, 1893, being desirous of assigning said policy conditionally to my daughter, the plaintiff herein, I called at the office of defendant New York Life Insurance Company, and requested R. H. McCreary, the agent there in charge of said office, to have said policy assigned to my said daughter on condition that I should die before said policy was paid in full, desiring to reserve to myself the right to collect any money to be paid on said policy at the maturity thereof if I should so long live.

The agent of said company, the said R. H. McCreary, had the instrument set forth on pages 44 and 45 of Exhibit 'A' to the amended answer of defendant New York Life Insurance Company prepared, and I signed the same on the said R. H. McCreary's assertion that it was an assignment to my

said daughter of the said policy only on condition that I should die before the [209] maturity of said policy, or before all the premiums were paid thereon. I did not read the assignment before executing the same, relying on the statement of the said R. H. McCreary, the agent of said company, that I was assigning it conditionally in the manner before stated. I had no intention of making an absolute assignment of said policy to my said daughter, or to any other person. I never delivered said policy or said assignment to the plaintiff, but said policy remained in my possession until I surrendered it to defendant New York Life Insurance Company. I delivered a copy of said instrument to defendant New York Life Insurance Company by reason of the notice appended thereto. The plaintiff had no knowledge whatever of the execution of said instrument by me until notified by defendant New York Life Insurance Company upon the maturity of said policy. Said assignment was made only for the purpose of protecting the plaintiff herein in case of my death before the maturity of said policy. I wrote and signed the letter to the New York Life Insurance Company, dated September 8, 1909, as set forth on pages 87 and 88 of Exhibit 'A' to the defendant New York Life Insurance Company's amended answer herein. I paid all the premiums due or payable on said policy.

FRANK W. TAFT,

Attorney for Plaintiff.

PAGE, McCUTCHEN, KNIGHT & OLNEY,
Attorneys for Defendant New York Life Insurance
Company, a Corporation."

[Testimony of Effie J. Dunlevy, for Plaintiff.]

EFFIE J. DUNLEVY, a witness called for plaintiff, was duly sworn and testified as follows:

“EFFIE DUNLEVY, called for the plaintiff, sworn.

Mr. TAFT.—Q. State your full name.

A. Effie Dunlevy.

Q. Where do you reside?

A. 903 Pine Street, San Francisco, Cal. [210]

Q. Did you know Joseph W. Gould?

A. Yes; he is my father.

Q. On June 27, 1893, where were you living?

A. With my father in Pittsburg, Pennsylvania.

Q. What was your age at that time?

A. 13 years.

Q. Was your father married at that time?

A. Yes.

Q. Were you living with him? A. Yes.

Q. Was he supporting you? A. Yes.

Q. For how long a time prior to June 27, 1893, were you living with your father?

A. About four years.

Q. How long after June 27, 1893, were you living with your father? A. Until 1898.

Q. During all of that time was he caring for you and supporting you? A. Yes.

Q. Were you living with him at his residence all that time?

A. No; about five months of the time I was not.

Q. During that five months that you were not living with him at his residence was he caring for you

and supporting you? A. Yes.

Q. Mrs. Dunlevy, has the amount due upon the policy of insurance here sued upon or any part thereof ever been paid to you? A. No, sir.

No cross-examination.”

The foregoing contains all of the evidence given and all of the exhibits introduced on the trial of said cause.

Thereupon, and, to wit, upon said 29th day of May, 1912, said cause was submitted to the court. Thereafter, and, to wit, on the 10th day of March, 1913, and within a stated term of said court, said court duly gave, made, and rendered its decision and filed the following decision and opinion herein: [211]

[Title of Court and Cause.]

“VAN FLEET, District Judge:

Plaintiff brings this action to recover \$2,479.70, the cash surrender value accrued under the tontine provisions of a policy of life insurance issued by the defendant insurance company on the life of its codefendant, Joseph W. Gould, the father of plaintiff, the policy being alleged to have been assigned by Gould to plaintiff.

The defenses of the insurance company are, (1) that there was no valid or perfected assignment of the policy to the plaintiff; and (2) that plaintiff is concluded by a judgment recovered against the company by its codefendant Gould on the same demand in the Court of Common Pleas of the State of Pennsylvania, under which judgment the amount involved has been fully paid to the latter. The answer of the defendant Gould, while silent as to the judgment, sets

up that the assignment counted on never became perfected for reasons that will be hereafter noticed.

1. As to the validity of the alleged assignment. The policy was issued to Gould, then a resident of Pittsburg, Pennsylvania, in 1889. In 1893, while his daughter, the plaintiff, was a child of thirteen years living with him and under his protection and maintenance, he went to the office of the local agent of the company and executed an assignment of the policy to her, absolute and unconditional in form, purporting to transfer to her 'all dividend, benefit, and advantage to be had or derived therefrom.' The assignment was executed in duplicate with all the formality required by the company, and acknowledged before a notary. As required by the rules of the company, both copies were sent to its home office in New York to be vised by the company before becoming effective; whereupon one copy was retained by the company and the other returned to Gould, who [212] kept it, with the policy, in his possession, and thereafter continued to pay the premiums until the expiration of the tontine period and the payment to him of the amount due thereon, as hereinafter stated, when it was surrendered to the company.

It is claimed that these facts fail to disclose a valid transfer of the policy for want of any delivery of the assignment and the policy to the plaintiff. If by this is meant that an actual physical delivery of the documents was essential to complete the transaction, the claim is untenable. In the first place, the formal execution and sending of the assignment to the insurance company, although in obedience to the re-

quirement of its rules, is presumptively for the benefit of the assignee, and as between the latter and the assignor, in the absence of anything to evince a contrary purpose, will be regarded as a sufficient delivery. *McDonough vs. Aetna Life Ins. Co.*, 78 N. Y. Supp. 217; *Hurlbutt vs. Hurlbutt*, 1 N. Y. Supp. 854. But, in the next place, no actual delivery was required under the circumstances disclosed in this cause because the assignee was incapable of receiving it. She was a minor under the care and protection of the assignor, her father, and the latter was therefore the natural custodian of her property and effects, as he was of her person. Under these circumstances no actual physical delivery was called for to perfect the title of the assignee. *Burges vs. New York Life Ins. Co.*, 53 S. W. 602. It is urged that the fact that Gould continued to pay the premiums on the policy is evidence that he did not regard the assignment as complete. This is without force. In making the assignment to his daughter, a minor, and so far as appears without estate, Gould knew that if the premiums were not paid by him they would not be paid at all, and the presumption will not be indulged that he entered upon the transaction with the purpose of doing a thing which would result in a forfeiture of all right under the policy for want of payment of the premiums. The presumption will [213] be preferred that in continuing to pay them it was his purpose to pay them for the benefit of his daughter.

The further claim that the assignment was a conditional one and never became effective is based upon

the testimony of Gould that he had no intention to make an absolute assignment to his daughter; that he told the agent of the company, when he went to the office to execute it, that he wished to make it conditional upon his dying before the policy was paid, desiring to reserve to himself the right to collect anything to be paid on the policy at its maturity, should he be alive; that the agent instead drew the assignment in the absolute form and it was signed by him without reading it, relying on the assurance of the agent that it was all right. This evidence is not sufficient to defeat the plaintiff's title. There is no suggestion of fraud in the transaction. If his evidence is true, Gould might, perhaps, have maintained an action to have the instrument reformed for mistake, but he has not done so, and no such relief is asked or may be had in this action. I am satisfied that the transfer of Gould's rights under the policy was a complete and valid transaction, and that neither he nor the insurance company can successfully assail it here. It must be borne in mind that we are not dealing with a case like those relied on by the defendants, where the rights of creditors, or innocent third parties with superior equities, are involved, but are concerned only with the rights of the assignor and his assignee as between themselves.

2. Is plaintiff concluded by the judgment pleaded in bar?

The record discloses these facts: In 1907 Boggs & Buhl, a creditor of the plaintiff, the latter then residing in Pennsylvania, recovered a judgment against her in the Court of Common Pleas of Allegheny

County in that State. That the Court obtained jurisdiction of this plaintiff in that case no question [214] is made, due service being had upon her in accordance with the laws of Pennsylvania. In November, 1909, knowledge of the interest claimed by the plaintiff in the policy in suit having come to the judgment creditor, a writ of execution attachment issued on the judgment and was served upon the local agent of the defendant insurance company in that State and upon Joseph W. Gould, the other defendant here. At this time the plaintiff had removed from Pennsylvania to this State and taken up her residence here, and no service of the writ was had on her. Gould appeared in response to the garnishment, denying any assignment of the policy to the plaintiff here and alleging a sole right in himself to the amount due thereon. The insurance company also answered, admitting its indebtedness under the policy, but setting up that the fund was claimed by both Gould and this plaintiff, and prayed to be advised as to its rights. Other creditors of the plaintiff having levied garnishments upon the insurance company against the fund, the latter filed a petition in the Court of Common Pleas asking leave to pay the money into court, and praying that the several claimants be required to interplead and have their respective rights determined. Leave was granted, the fund paid into the hands of the prothonotary, and thereafter, in February, 1910, the Court granted a rule as prayed requiring the several claimants to the fund to interplead for the purpose of determining their respective rights. It being made to appear that the

plaintiff here was then a resident of California, the Court directed that the rule be served upon her here by delivery of a copy to her personally, which was done, but plaintiff did not appear. The other parties having appeared, the Court thereafter entered a rule that a feigned issue be framed and tried to determine whether Gould had made a valid gift of the policy to the plaintiff here. A trial of this issue was had before a jury, [215] without the presence or appearance therein of the plaintiff, and the jury found that no assignment or gift of the policy had been made to plaintiff. Upon this verdict the Court of Common Pleas entered its order or judgment directing the prothonotary to pay over the fund to Joseph W. Gould, and held that neither the plaintiff here nor her creditors had any right therein. This is the adjudication upon which the defendant company relies as a bar to plaintiff's recovery.

I think it quite obvious that this judgment in no wise concludes plaintiff's rights involved in this case. The Court of Common Pleas, by virtue of the existence upon its records of a valid unsatisfied judgment against the plaintiff, undoubtedly acquired jurisdiction by its garnishee process to determine as between plaintiff and her creditors the rights of the latter to subject to the satisfaction of their judgment any debt due plaintiff, or other property of hers in Pennsylvania, to the extent of such judgment (*Louisville etc. Ry. Co. vs. Deer*, 200 U. S. 176; *Harris vs. Balk*, 198 U. S. 215; *Pennoyer vs. Neff*, 95 U. S. 714); but I regard it as equally certain that that court was without jurisdiction to proceed, without the personal

presence of the plaintiff, to try the question of the rights of plaintiff in the policy in suit as between her and Gould and the insurance company. The proceeding of interpleader at the instance of the insurance company, in which the feigned issue stated was sought to be tried, was in this respect quite independent of the proceeding on garnishment. (*Ruff* vs. *Ruff*, 85 Pa. St. Rep. 333.) As to the former, the Pennsylvania court was without jurisdiction of the person of the plaintiff, since the method of service upon her was wholly ineffectual for the purpose,—a proposition so thoroughly settled that the authorities need not be referred to. A Court must, to render an effectual judgment, have—[216] jurisdiction either of the person of the defendant or the *res*. (*Pennoyer* vs. *Neff*, *supra*.) The judgment of the Court of Common Pleas itself determines that it had no jurisdiction of the latter, since it is adjudged that the debt levied upon and which alone would give it jurisdiction was not the debt of plaintiff, but of a third party as against whom the creditors of plaintiff had no rights.

I am satisfied, therefore, that it must be held that the judgment pleaded is not conclusive upon the plaintiff and constitutes no bar to a recovery on the policy.

Judgment must accordingly go in favor of plaintiff for the amount sued for, with interest and costs, as prayed.

[Endorsed]: Filed March 10, 1913. W. B. Mal-
ing, Clerk.”

That thereafter, and to wit, on the 10th day of

March, 1913, judgment was entered in said action in favor of said plaintiff, and against the defendant New York Life Insurance Company, in accordance with the said opinion, in the sum of Three Thousand One Hundred Ninety-five and 70/100 (3,195.70) Dollars, together with plaintiff's costs of suit, and against the defendant Joseph W. Gould, that said Gould be barred from participating in the said sum, or any part thereof;

That thereafter, and, to wit, on the 11th day of March, 1913, notice was duly given to the defendant New York Life Insurance Company of the entry of said last mentioned judgment;

That thereafter, and within the time required by law, and, to wit, on the 12th day of April, 1913, defendant New York Life Insurance Company duly served upon plaintiff's attorneys, and filed in the above-entitled court in the above-entitled matter, its petition for a new trial; that, at all times from and after said 12th day of April, 1913, up to and including the 20th day of October, 1913, said last mentioned petition for a new trial was [217] pending before said District Court; that, on said 20th day of October, 1913, said District Court duly gave, made, and filed its order denying said petition for a new trial;

That, on the 19th day of March, 1913, pursuant to a stipulation signed by counsel for plaintiff and for said defendant New York Life Insurance Company on said date, said District Court ordered that said defendant New York Life Insurance Company have until the first day of April, 1913, within which to prepare its bill of exceptions to be used upon its writ

of error herein, said order being signed by said court and filed herein in the office of the clerk of said court; that thereafter, and from time to time, stipulations were entered into in writing by and between counsel for plaintiff and counsel for said defendant New York Life Insurance Company, extending the time of said defendant New York Life Insurance Company continuously up to and including the 15th day of September, 1913; that, in each instance, orders were made upon each of said stipulations by said District Court, extending the time of said defendant New York Life Insurance Company, as specified in said stipulations.

The foregoing constitutes all of the proceedings had, and all of the testimony offered and received, and all of the exhibits introduced on the trial of said cause.

And now, within the time required by law and the rules of this court, said defendant New York Life Insurance Company proposes the foregoing as and for its bill of exceptions, and prays that the same may be settled and allowed as correct.

PAGE, McCUTCHEN, KNIGHT & OLNEY,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for said Defendant New York Life Insurance Company. [218]

[Stipulation as to Bill of Exceptions.]

It is hereby stipulated that the foregoing bill of exceptions is correct, and that it contains all of the testimony offered and received, and all of the exhibits introduced, upon the trial of the said cause, and all of the proceedings had upon the trial of the said

cause, provided, however, that the plaintiff does not agree that the foregoing bill of exceptions was proposed or filed within the time required by law and the rules of this court, and that the plaintiff does not waive any of her rights to object to the filing of the foregoing bill of exceptions, or to object to its consideration, if allowed, by the Circuit Court of Appeals.

Dated October 30th, 1913.

FRANK W. TAFT,
CLARENCE COONAN,
NAT SCHMULOWITZ,
Attorneys for Plaintiff.

PAGE, McCUTCHEN, KNIGHT &
OLNEY,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Defendant, New York Life Insurance
Company.

**Order Settling, Certifying, and Allowing Bill of
Exceptions.**

The foregoing bill of exceptions being now presented in due time and found to be correct, I do hereby certify that the said bill is a true bill of exceptions, and that it contains all of the testimony offered and received, and all of the exhibits introduced, and all of the proceedings had on the trial of said cause.

Dated October 31st, 1913.

WM. C. VAN FLEET,
United States District Judge for the Northern Dis-
trict of California, Second Division. [219]

Receipt within proposed Bill of Exceptions and
Engrossed Bill of Exceptions and receipt of a copy

is hereby admitted this 30th day of October, 1913.

Plaintiff reserves all right to object to the filing of the within on consideration thereof, by the Circuit Court of Appeals.

FRANK W. TAFT,
CLARENCE COONAN,
NAT SCHMULOWITZ,
Attys. for Plaintiff.

[Endorsed]: Filed Oct. 31, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [220]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,041.

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation, and JOSEPH W. GOULD,
Defendants.

Affidavit of Service of Summons in Severance.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

John W. Parker, being first duly sworn, deposes and says:

That he is and at all the times herein mentioned was a male person over the age of eighteen (18) years, and not a party to nor interested in the above-entitled action; that Joseph W. Gould, one of the

defendants in the above-entitled action, and the person mentioned in the annexed summons in severance, is alleged to have appeared in the above-entitled action; that said Joseph W. Gould has not left any address with the clerk of the above-entitled court as provided by Rule 35 of this court, nor has any attorney left such address for or in behalf of said Joseph W. Gould; that affiant duly served the annexed summons in severance upon said Joseph W. Gould by delivering to and leaving with the Clerk of the above-entitled Court, at the office of said Clerk, a true and correct copy of said summons in severance for said Joseph W. Gould, on the 13th day of November, 1913, as required by Rule 34 of this Court. [221]

That so far as known to affiant said Joseph W. Gould has no attorney in the above-entitled action.

And further affiant saith not.

JOHN W. PARKER.

Subscribed and sworn to before me this 13th day of November, 1913.

[Seal]

FRANCIS KRULL,
United States Commissioner, Northern Dist. of California. [222]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,041.

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation, and JOSEPH W. GOULD,
Defendants.

Summons in Severance.

To Joseph W. Gould, Esquire.

You are hereby invited to join with the undersigned to prosecute a writ of error in the above entitled cause from the United States Circuit Court of Appeals in and for the Ninth Circuit to the United States District Court, Northern District of California, Second Division, to reverse the judgment in the above-entitled cause given, made and rendered against you and the undersigned on the 10th day of March, 1913, or the undersigned shall prosecute said writ of error without joining you as a party.

NEW YORK LIFE INSURANCE COMPANY, a Corporation.

By PAGE, McCUTCHEN, KNIGHT &
OLNEY,

McCUTCHEN, OLNEY & WILLARD,

Its Attorneys.

[Endorsed]: Filed Nov. 13, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [223]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,041.

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation, and JOSEPH W. GOULD,
Defendants.

Petition for Writ of Error.

New York Life Insurance Company, a corporation, defendant in the above-entitled action, feeling itself aggrieved by the decision of the Court and the judgment entered herein on the 10th day of March, 1913;

Comes now by Messrs. Page, McCutchen, Knight & Olney and McCutchen, Olney & Willard, its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon such writ of error, and that upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

Dated: November 13th, 1913.

PAGE, McCUTCHEN, KNIGHT &
OLNEY,

McCUTCHEN, OLNEY & WILLARD,
Attorneys for Said Defendant.

[Endorsed]: Filed Nov. 13, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [224]

*In the District Court of the United States, for the
Northern District of California, Second Di-
vision.*

No. 15,041.

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation, and JOSEPH W. GOULD,
Defendants.

Assignment of Errors.

Now comes New York Life Insurance Company, a corporation, defendant above named, and makes and files the following assignment of errors, upon which it will rely in the prosecution of its writ of error in the above-entitled cause.

I.

The District Court above named for the Northern District of California, Second Division, erred in entering judgment in favor of plaintiff and against said defendant, New York Life Insurance Company, a corporation, upon the agreed facts.

II.

The said Court erred in entering judgment in favor of plaintiff and against the defendant, New York Life Insurance Company, a corporation, and the defendant, Joseph W. Gould, upon the agreed facts.

III.

The said Court was without jurisdiction to enter judgment, or any judgment, in said cause against the defendant, Joseph W. Gould.

IV.

The decision was contrary to, and against law, because [225] said Court erred in making, giving, rendering and entering judgment in favor of plaintiff and against defendant, New York Life Insurance Company, and erred in failing to give, make, render and enter its judgment in favor of said defendant.

V.

Said Court erred in entering judgment in favor of the plaintiff and against defendant, New York Life Insurance Company, because it appears from the undisputed facts of the case that the plaintiff was not entitled to recover the proceeds arising from the policy of life insurance sued upon by virtue of its tontine provisions.

VI.

The Court erred in rendering judgment for plaintiff and against said defendant because it appears from the undisputed facts of the case that the tontine benefits of the policy of life insurance sued upon by plaintiff were not assigned by Joseph W. Gould, the beneficiary named in said policy of life insurance, to plaintiff, and plaintiff never became the owner of, or

entitled to sue for, the proceeds of said policy accruing under the tontine provisions of said policy.

VII.

The Court erred in rendering judgment in favor of plaintiff and against defendant, New York Life Insurance Company, a corporation, because it appears from the undisputed facts of the case that Joseph W. Gould, the beneficiary named in the policy of life insurance sued upon by plaintiff, retained to himself all rights and benefits to arise under the tontine provisions of said policy, and never assigned the same, nor transferred the same in any manner to plaintiff.

VIII.

Said Court erred in rendering judgment in favor of plaintiff [226] and against said defendants, New York Life Insurance Company, a corporation, and Joseph W. Gould, because it appears from the undisputed facts of the case that on or about the 19th day of September, 1910, it was adjudicated by a Court of competent jurisdiction that plaintiff had no right, title or interest in and to the proceeds of said life insurance policy as more fully appears from Exhibit "A" to the amended answer to said New York Life Insurance Company on file herein.

IX.

Said Court erred in overruling the demurrer of said defendant, New York Life Insurance Company, a corporation, to plaintiff's complaint.

X.

The said Court was without jurisdiction to try said cause without a jury owing to the fact that defendant, Joseph W. Gould, did not consent, in writing, to the

trial of said cause by the Court without a jury, nor, in writing, waive said jury in the manner required by law in the statutes of the United States, all of which appears from the records of said Court and from the bill of exceptions of defendant, New York Life Insurance Company, a corporation, on file herein.

XI.

The decision and judgment was contrary to and against law because the Court erred in giving judgment for the plaintiff and against the defendant, New York Life Insurance Company, and in holding and deciding that the delivery of a copy of the assignment referred to and set forth in plaintiff's complaint to New York Life Insurance Company was, or constituted, a delivery of said assignment to the plaintiff herein, it appearing from the facts contained in the agreed statement of facts that the delivery of said copy of said assignment to said New York Life Insurance [227] Company did not in law constitute a delivery of said assignment to said plaintiff.

XII.

The decision and judgment were contrary to and against law because the Court erred in giving judgment for plaintiff and against defendant, New York Life Insurance Company, and in holding and deciding that the defendant, Joseph W. Gould, had, prior to the commencement of the action, made an absolute assignment of all his right, title and interest to all benefits to accrue under the policy of insurance sued upon to the plaintiff herein, and had delivered said assignment to said plaintiff, it appearing from the

agreed statement of facts that if the assignment referred to in plaintiff's complaint was delivered to New York Life Insurance Company by said Gould for said plaintiff, such delivery was a conditional delivery only and was not to take effect as a delivery to said plaintiff unless the said Gould should die within the tontine period provided for in said policy of insurance.

XIII.

The decision and judgment were contrary to and against law because the Court erred in giving judgment for plaintiff and against defendant, New York Life Insurance Company, in holding and deciding that Joseph W. Gould, the beneficiary named in the policy of life insurance of the New York Life Insurance Company, sued upon by plaintiff had, prior to the commencement of the action, assigned to plaintiff the particular benefits arising from said policy which were the subject of this action, to wit, benefits arising under the tontine provisions of said policy, it appearing from the agreed statement of facts and from the undisputed facts of the case that at the time of the delivery of the assignment referred to in plaintiff's complaint to the New York Life Insurance Company, said Gould intended to transfer to said [228] plaintiff only the benefits to arise under said policy, other than the tontine benefits, and intended to retain to himself any benefits that might arise at any time under said policy by reason of its tontine provisions.

XIV.

The decision was contrary to and against law be-

cause the Court erred in giving judgment for plaintiff against the defendant, New York Life Insurance Company, because it appeared from the allegations of plaintiff's complaint that the defendant, Joseph W. Gould, was in possession of the original policy of insurance sued upon by plaintiff and was claiming and claimed the right to recover against the defendant, New York Life Insurance Company, the same proceeds of said policy which were being sued for by plaintiff, and because it appeared from the records in this case that the Court was and is without jurisdiction to render a judgment binding upon said defendant, Joseph W. Gould.

WHEREFORE, said New York Life Insurance Company, a corporation, plaintiff in error herein, prays that the judgment of the above-entitled court be reversed, and that a new trial be granted.

DATED: San Francisco, California, November 13th, A. D. 1913.

PAGE, McCUTCHEN, KNIGHT &
OLNEY,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Said Plaintiff in Error.

[Endorsed]: Filed Nov. 13, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [229]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,041.

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation, and JOSEPH W. GOULD,

Defendants.

Order Allowing Writ of Error.

Upon motion of McCutchen, Olney & Willard, attorneys for the defendant, New York Life Insurance Company, a corporation, and upon filing a petition for a writ of error, and an assignment of errors,

IT IS ORDERED that a writ of error be, and it hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and the same is, hereby fixed at Four Thousand (4,000) Dollars; said bond to serve as a cost bond and a superseas bond on said writ of error.

IT IS FURTHER ORDERED that said New York Life Insurance Company be, and it is, hereby allowed a severance from its codefendant herein, Joseph W. Gould, and that said New York Life Insurance Company be permitted to prosecute said writ of error without the presence of said Joseph W.

234 *New York Life Insurance Company et al.*

Gould as a party thereto.

Dated: November 13th, 1913.

WM. C. VAN FLEET,
Judge of Said Court.

[Endorsed]: Filed Nov. 13, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [230]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,041.

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation, and JOSEPH W. GOULD,
Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, New York Life Insurance Company, a corporation, as principal, and Massachusetts Bonding and Insurance Company a corporation organized under the laws of the State of Massachusetts, and duly authorized to execute bonds and undertakings in judicial proceedings pending in the courts of the United States, as surety, are held and firmly bound unto Effie J. Gould Dunlevy, plaintiff in the above-entitled action in the full and just sum of Four Thousand (4000) Dollars, lawful money of the United States, to be paid to the said plaintiff, Effie J. Gould Dunlevy, to which payment well and truly to be made,

we bind ourselves and each of us, jointly and severally, and our and each of our heirs, successors, representatives and assigns firmly by these presents.

Sealed with our seals, and dated this 13th day of November, 1913.

WHEREAS, the above-named defendant, New York Life Insurance Company, a corporation, has sued out a writ of error in the United States Circuit Court of Appeals in and for the Ninth Circuit, to reverse the judgment entered in the above-entitled action in [231] favor of the plaintiff therein and against the defendants therein for the sum of Four Thousand (4000) Dollars, including interest and costs.

NOW, THEREFORE, the condition of this obligation is such that if the above-named New York Life Insurance Company, a corporation, shall prosecute such writ of error to effect, and answer all damages and costs if it shall fail to make good said plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

IN WITNESS WHEREOF, said New York Life Insurance Company, a corporation, has caused its name to be hereunto subscribed, and its corporate seal to be hereunto affixed by its officers thereunto duly authorized, and said Massachusetts Bonding and Insurance Company, a corporation, has caused its name to be hereunto subscribed, and its corporate seal to be hereunto affixed by its officers thereunto duly au-

thorized this 13th day of November, 1913.

NEW YORK LIFE INSURANCE COM-
PANY, a Corporation,

By ARTHUR HUTCHINSON and
MASSACHUSETTS BONDING AND IN-
SURANCE COMPANY,

By FRANK M. HALL and
S. M. PALMER,

Attorneys in Fact.

[Seal Massachusetts Bonding & Ins. Co.]

[Endorsed]: Bond on Writ of Error.

Approved:

WM. C. VAN FLEET,
Judge.

Filed Nov. 14, 1913. W. B. Maling, Clerk. [232]

[Certificate of Clerk U. S. District Court to Tran-
script of Record.]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

No. 15,041.

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation, and JOSEPH W. GOULD,
Defendants.

I, Walter B. Maling, Clerk of the District Court
of the United States, in and for the Northern Dis-

trict of California, do hereby certify the foregoing two hundred and thirty-two (232) pages, numbered from 1 to 232, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause, as the same remain of record and on file in the office of the Clerk of said court, and that the same constitutes the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$123.60, that said amount was paid by Messrs. McCutchen, Olney & Willard, attorneys for the New York Life Insurance Company; and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of December, A. D. 1913.

[Seal]

WALTER B. MALING,

Clerk of the United States District Court, Northern
District of California. [233]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,041.

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation, and JOSEPH W. GOULD,
Defendants.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honorable
the Judges of the District Court of the United
States, Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between Effie J. Gould Dunlevy and New York Life Insurance Company, a corporation, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said New York Life Insurance Company, a corporation, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties [234] aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city and county of San Francisco, in the State of California, on the 13th day of December, A. D. 1913, in the Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the

laws and customs of the United States should be done.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, the 13th day of November, in the year of our Lord one thousand nine hundred and thirteen.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,
Judge. [235]

Receipt of copy of the within Writ of Error is hereby admitted this 14th day of November, 1913.

FRANK W. TAFT,
CLARENCE COONAN,
NAT SCHMULOWITZ,
Attys. for Plaintiff.

[Endorsed]: No. 15,041. In the District Court of the United States, Northern District of California, Second Division. Effie J. Gould Dunlevy, Plaintiff, vs. New York Life Insurance Company, a Corporation, and Joseph W. Gould, Defendants. Writ of Error. Filed Nov. 14, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Answer to Writ of Error.]

The answer of the Judges of the District Court of

the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is made in the writ of error, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, at the day and place contained in the writ of error, in a certain schedule to the writ annexed as we are in said writ of error commanded.

By the Court.

WALTER B. MALING,
Clerk. [236]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,041.

EFFIE J. GOULD DUNLEVY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation, and JOSEPH W. GOULD,
Defendants.

Citation on Writ of Error.

The President of the United States of America to
Effie J. Gould Dunlevy, and to Frank W. Taft,
Clarence Coonan and Nat Schmulowitz, Her At-
torneys, Greeting:

YOU AND EACH OF YOU ARE HEREBY
cited and admonished to be, and appear, in the Cir-

cuit Court of Appeals for the Ninth Circuit, at the City and County of San Francisco, State of California, within thirty (30) days from and after the date this citation bears, pursuant to a writ of error filed in the office of the Clerk of the United States District Court for the Northern District of California, Second Division, in the above-entitled cause, wherein Effie J. Gould Dunlevy is plaintiff, and New York Life Insurance Company, a corporation, and Joseph W. Gould, are the defendants, to show cause, if any there be, why the judgment made and rendered in the above-entitled cause [237] on the 10th day of March, 1913, against the said New York Life Insurance Company, a corporation, and the said Joseph W. Gould, as defendants in said writ of error mentioned, should not be corrected and reversed, and why said justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 13th day of November, 1913.

WM. C. VAN FLEET,

United States District Judge for the Northern District of California.

[Seal]

Attest: W. B. MALING,

Clerk of the Above-entitled Court.

By J. A. Schaertzer,

Deputy Clerk. [238]

Receipt of copy of the within Citation is hereby admitted this 14th day of November, 1913.

FRANK W. TAFT,

CLARENCE COONAN,

NAT SCHMULOWITZ,

Attys. for Plaintiff.

[Endorsed]: No. 15,041. In the District Court of the United States, Northern District of California, Second Division. Effie J. Gould Dunlevy, Plaintiff, vs. New York Life Insurance Company, a Corporation, and Joseph W. Gould, Defendants. Citation on Writ of Error. Filed Nov. 14, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2349. United States Circuit Court of Appeals for the Ninth Circuit. New York Life Insurance Company, a Corporation, and Joseph W. Gould, Plaintiffs in Error, vs. Effie J. Gould Dunlevy, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Received and filed December 13, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals.
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

No. 2349

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY
(a corporation), and JOSEPH W. GOULD,
Plaintiffs in Error,

VS.

EFFIE J. GOULD DUNLEVY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR, NEW YORK LIFE INSURANCE COMPANY.

I.

Statement of the Case.

This writ of error is prosecuted from a judgment of the District Court of the Northern District of California, Second Division.

Effie J. Gould Dunlevy, the plaintiff in the court below (defendant in error herein), brought suit in the Superior Court of the State of California, in and for the County of Marin, upon a policy of life insurance issued by the New York Life Insurance Company

(plaintiff in error herein), to one Joseph W. Gould. In her complaint, defendant in error claimed that after the issuance of the policy to Gould, the latter assigned it to her, and her right of recovery was predicated upon Gould's assignment. Upon the petition of the New York Life Insurance Company the cause was removed to the District Court and was tried there upon the plaintiff's complaint, upon an amended answer of New York Life Insurance Company thereto, and upon an agreed statement of facts. The District Court gave judgment for the defendant in error for the full amount claimed in her complaint.

In its amended answer plaintiff in error set up two defenses:

(1) That the defendant in error was not entitled to maintain the action because (a) Gould's assignment was never delivered to her, and (b) because Gould's assignment was not intended by Gould to transfer to defendant in error the tontine benefits to arise from the policy;

(2) Because by reason of certain garnishee proceedings instituted by creditors of the defendant in error in the State of Pennsylvania, the plaintiff in error had already been compelled to pay the full amount due under the policy.

The policy sued upon was what is known as a tontine policy. It was issued by the New York Life Insurance Company to Joseph W. Gould, the father and the assignor of defendant in error, on January 22nd, 1889

(Tr. pp. 82-102). By its provisions the life of Joseph W. Gould was insured in the sum of \$5,000; but it also had a paid-up value of \$2,479.70. In other words the Insurance Company agreed that if Joseph W. Gould were living on the 22nd day of January, 1909, the policy might be surrendered by the insured for the sum of \$2,479.70.

Joseph W. Gould did survive the twenty-year period. Consequently the present action involves the recovery, not of the death benefits of the said policy, but of the so-called tontine benefits.

The action in the lower court being, therefore, an action to recover the *tontine* benefits arising from the policy of insurance, it devolved upon defendant in error to show title in her to *tontine* benefits as distinguished from death benefits. It appeared that on the 27th of June, 1893, when the defendant in error was thirteen years old, and while she was living with Joseph W. Gould, Gould signed the assignment upon which defendant in error relies. This assignment was in the following words and figures:

“For value received I hereby assign and transfer unto Effie J. Gould, of Pittsburgh, Pa., the Policy of Insurance known as No. 305,011, issued by the New York Life Insurance Company upon the life of Joseph W. Gould, of Pittsburgh, Pa., and all dividend, benefit, and advantage to be had or derived therefrom, subject to the conditions of the said Policy, and to the Rules and Regulations of the Company.

WITNESS my hand and seal this 27th day of June, One Thousand Eighteen Hundred and Ninety-three.

(Signed) JOSEPH W. GOULD.

State of Pennsylvania,
County of Allegheny,—ss.

On this 27th day of June, 1893, before me, personally came Joseph W. Gould, to me known to be the individual described in and who executed the foregoing assignment, and acknowledged that he executed the same.

(Signed) HENRY C. RYAN,
Notary Public."

(Tr. pp. 2-4; 106-107.)

The facts with respect to the delivery of this assignment were stipulated by the parties to be as follows:

"That on or about the 27th day of June, 1893, defendant Joseph W. Gould, the assured in said policy, signed the instrument, a correct copy of which is set forth on pages 44 and 45, in Exhibit 'A' to the amended answer of defendant New York Life Insurance Company.

"That said policy remained in the possession of defendant Joseph W. Gould, the assured mentioned therein, and was never delivered to plaintiff herein; that said instrument, hereinbefore mentioned and set forth on pages 44 and 45 of said Exhibit 'A' to defendant New York Life Insurance Company's amended answer herein, was not, nor was any copy thereof, ever delivered to the plaintiff herein, but a copy of the same was delivered to defendant New York Life Insurance Company; that the notice attached to the said instrument contains a statement of the rules of defendant New York Life Insurance Company in force at the time of the signing thereof, and defendant New York Life Insurance Company

executed the receipt therefor, as set forth on page 44 of Exhibit 'A' to the amended answer of defendant New York Life Insurance Company as follows:

“ ‘The New York Life Insurance Company, in accordance with its rules, as stated below, has retained the duplicate of this assignment.

“ ‘JOHN A. McCALL, Pres.

“ ‘Per Lawes’.”

(Tr. pp. 207-208.)

It was also agreed that, if Gould were placed upon the stand, he would testify that his intention in executing the assignment and delivering it to the New York Life Insurance Company was solely to protect defendant in error in the event of his death prior to the expiration of the tontine period; that he wanted her to receive the \$5,000 in the event of his death prior to the 22nd day of January, 1909; that he had absolutely no intention of giving her the tontine benefits of the policy should he survive until January 22nd, 1909 (Tr. pp. 210-211).

The facts relied upon in the second defense of the Insurance Company were as follows:

On June 18th, 1907, Boggs & Buhl, a creditor of the defendant in error, instituted an action for goods sold and delivered against defendant in error in the Court of Common Pleas of the County of Allegheny in the State of Pennsylvania (Tr. p. 43). Summons was issued in this action and the defendant in error was served on June 24th, 1907, in Pennsylvania, being at that time a resident of the State of Pennsylvania (Tr. p. 59). On July 8th, 1907, judgment was entered in favor of Boggs & Buhl upon the default of the defendant in error for the sum of \$536.76 (Tr. pp. 43, 59, 61). On

November 10th, 1909, this judgment was still outstanding and unsatisfied, and on that date the judgment creditor, Boggs & Buhl, caused a writ of execution to issue upon the judgment, and such writ of execution was, on November 11th, 1909, served upon F. W. Hubbard, the duly authorized cashier of plaintiff in error herein, within the State of Pennsylvania (Tr. pp. 61, 64). Later a rule was obtained by Boggs & Buhl pursuant to the garnishment procedure under the Pennsylvania Statutes and under this rule the New York Life Insurance Company was required to make answer to certain interrogatories (Tr. pp. 62, 76-120). Later, and on March 19th, 1910, it was ordered that the New York Life Insurance Company pay the sum of \$2479.70 into court, pursuant to the garnishment proceedings heretofore described, and on March 21st, 1910, that sum was paid by the New York Life Insurance Company to the prothonotary of the Pennsylvania court and was deposited by the prothonotary subject to the further order of the court (Tr. p. 62).

On February 5th, 1910, the Pennsylvania court made an order directing that Effie J. Gould Dunlevy, Joseph W. Gould and Boggs & Buhl should interplead to determine to which one of them the moneys admitted to be in the hands of the New York Life Insurance Company as the proceeds of said policy of insurance, belonged (Tr. p. 144). In response thereto Boggs & Buhl answered, alleging that the proceeds of the policy belonged to Effie J. Gould Dunlevy by reason of the assignment hereinabove referred to, and therefore that

such moneys were subject to its execution levy. Joseph W. Gould also answered, alleging that these moneys belonged to him; that he had never assigned the tontine benefits of the policy to Mrs. Dunlevy. Defendant in error had in the meantime moved to the State of California. She was served with the order to show cause personally in the State of California, and she neither answered nor appeared to the order (Tr. p. 135).

On May 3rd, 1910, the Pennsylvania court ordered that a feigned issue should be tried between Joseph W. Gould and Boggs & Buhl and certain other creditors of Mrs. Dunlevy who had intervened as to "whether Joseph W. Gould made a valid gift of policy No. 305,011, issued to him by the New York Life Insurance Company, to Effie J. Gould, now Effie J. Dunlevy" (Tr. p. 149). Thereafter such feigned issue was tried before a jury and on September 19th, 1910, a verdict was rendered in favor of Joseph W. Gould (Tr. p. 192). On September 24th, 1910, judgment was entered upon said verdict (Tr. p. 170). On October 1st, 1910, Joseph W. Gould applied for an order directing the prothonotary to pay over the fund which had been placed in his hands by the New York Life Insurance Company (Tr. p. 170) and on the same date, October 1st, 1910, such order was made (Tr. p. 171). On October 3rd, 1910, the prothonotary paid the sum of \$2471 which had been deposited by the New York Life Insurance Company in his hands, to the attorneys for Joseph W. Gould, pursuant to the judgment in the feigned issue proceedings (Tr. p. 162).

II.

Specification of Errors.

The first group of assignments presents the question as to the right of the defendant in error to recover the tontine benefits arising under the policy by reason of the assignment from Joseph W. Gould. This group includes assignments of errors V, VI, VII, XI, XII and XIII.

In assignment XI the point is made that there was no sufficient delivery whatever of the assignment from Joseph W. Gould, as follows:

“The decision and judgment was contrary to and against law because the Court erred in giving judgment for the plaintiff and against the defendant, New York Life Insurance Company, and in holding and deciding that the delivery of a copy of the assignment referred to and set forth in plaintiff’s complaint to New York Life Insurance Company was, or constituted, a delivery of said assignment to the plaintiff herein, it appearing from the facts contained in the agreed statement of facts that the delivery of said copy of said assignment to said New York Life Insurance Company did not in law constitute a delivery of said assignment to said plaintiff.”

(Tr. p. 230.)

In assignment XII the point is made that if the delivery of a copy of the assignment of Joseph W. Gould to the defendant in error to the New York Life Insurance Company constituted a delivery of which defendant in error could avail herself, nevertheless such delivery was conditional upon the death of Joseph

W. Gould within the tontine period, that is to say, prior to January 22nd, 1909. Assignment XII reads as follows:

“The decision and judgment were contrary to and against law because the court erred in giving judgment for plaintiff and against defendant, New York Life Insurance Company, and in holding and deciding that the defendant, Joseph W. Gould, had, prior to the commencement of the action, made an absolute assignment of all his right, title and interest to all benefits to accrue under the policy of insurance sued upon to the plaintiff herein, and had delivered said assignment to said plaintiff, it appearing from the agreed statement of facts that if the assignment referred to in plaintiff’s complaint was delivered to New York Life Insurance Company by said Gould for said plaintiff, such delivery was a conditional delivery only and was not to take effect as a delivery to said plaintiff unless the said Gould should die within the tontine period provided for in said policy of insurance.”

(Tr. pp. 230-231.)

In assignment XIII the point is made that there was no such intention upon the part of Joseph W. Gould to transfer to defendant in error the tontine benefits arising under the policy as would be sufficient to satisfy the rule requiring intention to give in all cases of a gift *inter vivos*. Assignment XIII reads as follows:

“The decision and judgment were contrary to and against law because the Court erred in giving judgment for plaintiff and against defendant, New York Life Insurance Company, in holding and deciding that Joseph W. Gould, the beneficiary named in the policy of life insurance of the New

York Life Insurance Company, sued upon by plaintiff had, prior to the commencement of the action, assigned to plaintiff the particular benefits arising from said policy which were the subject of this action, to wit, benefits arising under the tontine provisions of said policy, it appearing from the agreed statement of facts and from the undisputed facts of the case that at the time of the delivery of the assignment referred to in plaintiff's complaint to the New York Life Insurance Company, said Gould intended to transfer to said plaintiff only the benefits to arise under said policy, other than the tontine benefits that might arise at any time under said policy by reason of its tontine provisions."

(Tr. p. 231.)

The second question involved in the case, namely the question as to the effect of the garnishment proceedings in Pennsylvania and the payment by the New York Life Insurance Company pursuant to the Pennsylvania garnishment, is covered by the 8th assignment. Assignment VIII is as follows:

"Said Court erred in rendering judgment in favor of plaintiff and against said defendants, New York Life Insurance Company, a corporation, and Joseph W. Gould, because it appears from the undisputed facts of the case that on or about the 19th day of September, 1910, it was adjudicated by a Court of competent jurisdiction that plaintiff has no right, title or interest in and to the proceeds of said life insurance policy as more fully appears from Exhibit 'A' to the amended answer to said New York Life Insurance Company on file herein."

(Tr. p. 229.)

III.

Brief of the Argument.

The argument for plaintiff in error will take the following course:

A.

Defendant in error had no right to the tontine benefits arising under the policy (Assignments of Error V, VI, VII, XI, XII and XIII).

(1) There was no delivery of the assignment from Gould to the defendant in error.

(a) The deposit of the duplicate with the Insurance Company was not a delivery.

(b) The possession of the assignment by Gould was not the possession of his minor daughter, the defendant in error.

(2) Assuming that the possession of the assignment by Gould, or of the duplicate by the Insurance Company, constituted a delivery, yet such delivery was conditional, to take effect only in case Gould died before the expiration of the tontine period.

(3) The intent to make a gift of the tontine benefits is lacking. Mrs. Dunlevy claims as the donee of her father.

(a) Gould's evidence that he did not intend to make a gift of the tontine benefits to Mrs. Dunlevy is uncontradicted.

(b) Gould's parol evidence is competent to vary the terms of the written assignment because the Insurance Company was not a party nor privy thereto.

B.

Defendant in error was barred by the Proceedings in Pennsylvania (Assignment of Error VIII).

(1) Plaintiff in error protected itself by paying the proceeds of the policy into court, whether or not the Pennsylvania court had jurisdiction in the subsequent feigned issue proceeding.

(a) The laws of Pennsylvania permit a garnishee to protect himself from double payment by depositing the amount of his debt in court.

(b) The garnishee cannot be made a party to the feigned issue proceeding under the Pennsylvania statute and is not concerned with the outcome thereof.

(c) If the judgment in the feigned issue proceeding was void Mrs. Dunlevy's remedy was against the prothonotary, not against the Insurance Company.

(2) Defendant in error was bound by the judgment in the feigned issue proceeding, because

(a) Service in California pursuant to the Pennsylvania statute was sufficient provided the Pennsylvania court had jurisdiction of the *res* in the feigned issue proceeding.

(b) The situs of a debt for the purpose of garnishment is where the debtor can be found and hence the Pennsylvania court did have jurisdiction of the *res*.

A.

**DEFENDANT IN ERROR HAD NO RIGHT TO THE TONTINE
BENEFITS ARISING UNDER THE POLICY.**

1. There Was No Delivery of the Assignment.

Plaintiff in error contends that from the agreed statement of facts it appears that there was no delivery whatever from Joseph W. Gould to defendant in error of the assignment of June 27th, 1893.

On June 27th, 1893, Joseph W. Gould signed the assignment. It is admitted that he never delivered the original or a copy thereof to defendant in error; that he never delivered the policy to defendant in error. All that is relied upon to show delivery of the assignment is:

First, the lodging of a copy thereof with the home office of the New York Life Insurance Company;

Secondly, the fact that on June 27th, 1893, defendant in error was a child of thirteen and was residing with Gould, her father, with whom she continued to reside until 1898.

(a.) The lodging of the duplicate with the Insurance Company did not constitute a delivery to defendant in error.

In the case of

Scott v. Dickson, 108 Pa. St. 6,

Archibald Dickson, the decedent, had, in his lifetime, effected a policy of insurance upon his life, and the policy was sent to one Woolridge for delivery. Upon the decedent's calling at the office of Mr. Woolridge to receive the policy, decedent said to Woolridge that he wanted to transfer it to the plaintiff. Woolridge

called the attention of the decedent to the company's requirement in case of the transfer, as printed upon the policy, and then produced two blank forms for assignment, used by the company, both of which were then filled up and signed by the decedent. One of the assignments was delivered to Woolridge, who forwarded it to the general office of the company, where it was received and noted; the other copy, with the policy, remained in the possession of the decedent until his death. The decedent himself paid all premiums upon the policy. He never told the plaintiff that he had procured or transferred the policy, and the first knowledge that Scott had of its existence was after the death of Dickson.

The form of assignment, as set forth on page 9 of the report of the case, is stronger, if anything, than that involved in the instant case. Judgment went for the plaintiff in the lower court, from which judgment the defendant appealed. The judgment was reversed by the Supreme Court, for the reason that no valid assignment had been made, owing to a lack of delivery.

Justice Paxton, who delivered the opinion of the court, said, in part:

“But I more than doubt whether the assignment *qua* assignment was sufficient to pass the title. It was true an assignment was made in form and lodged with the company, in accordance with its rules, but no copy of it was ever given to Scott, nor was he notified thereof, and the policy was retained by Dickson, who continued to pay the premiums up to the time of his death, in pursuance of a request made to the company that the premium notices should be sent to him, Dickson. * * *

In the case in hand the delivery of the assignment to the company was not the equivalent of a delivery to Scott. The whole thing was *in fieri*; there was no consideration, and the assignment being the voluntary act of the assured, was subject to his power of revocation. That circumstances might have arisen which would have made the revocation a matter of some trouble and expense, is not to the purpose. The true test was the right to revoke or cancel the assignment. If that existed, nothing passed to the assignee at the time of said assignment."

Spooner's Adm'r v. Hilbish Ex'r, 23 S. E. 751 (Va.).

This was an action by the administrator of the estate of Spooner against the executor of the estate of Hilbish, to set aside a purported assignment of a policy of life insurance. The policy was issued to Hilbish in July, 1888. All the premiums were paid by Hilbish during his lifetime.

The evidence showed that at one time Hilbish contemplated making an assignment of the policy to Spooner, who claimed that such assignment had taken place. The rules of the insurance company required that assignments of its policies should be made in duplicate and sent to the company for acknowledgment, when one was to be returned to the insured, and the other retained by the company. Accordingly, Hilbish procured printed forms, prepared, signed and acknowledged them in duplicate, and sent them to the company, which kept one and returned the other to Hilbish. There was no evidence that Hilbish ever delivered to Spooner the duplicate assignment, which was returned to him by

the company. Spooner had admitted to the administrator that he had never received it, nor was it found among the papers of Spooner. Neither was the policy itself delivered to Spooner, but was found among Hilbish's papers at the time of his death. The court held that no assignment had taken place, for want of delivery.

The court, after quoting from the authorities regarding the necessity of a delivery, says:

“These judicial expressions show how necessary to the validity of a gift is an actual delivery of the thing itself, or of some equivalent of a delivery. Here there was no delivery of the policy by Hilbish to Spooner, or of any writing assigning it to him. The duplicate assignment was not left with the company, or retained by it, as the agent or other representative of Spooner, but only for its own protection, in the event that an actual assignment of the policy was made. Without the delivery of the policy, or of a writing assigning it, the gift was incomplete and invalid,—a mere nullity,—and consequently incapable of being enforced either at law, or in equity. The case of *Scott v. Dickson*, 108 Pa. St. 6, in the feature before us, is directly in point.

(The court discussed the last cited case, and then, referring to it, says):

“While the court nevertheless held in that case that the proceeds of the policy should be paid to the assignee, this conclusion was not reached by virtue of the assignment, but on the ground that it clearly appeared that the policy was intended for the benefit of the assignee at the time it was taken out, and that the failure to make the loss payable to the assignee when the policy was issued was the fault of the company, and not of the insured, and

that the form of the transaction should not defeat his intention. But no such state of facts exists in this case. There is no evidence whatever that Hilbish intended when he took out the policy that it should be for the benefit of Spooner. On the contrary, there was no such purpose. The policy was taken out by Hilbish, for his own benefit, on July 31, 1888; and there is no evidence of any intention to assign it to Spooner, or to make him a donee of the policy or its proceeds, until March 14, 1892,—nearly four years thereafter. Our conclusion is that, however much Hilbish may have intended at one time to assign the policy to Spooner, he never executed his intention, and that the policy remained his property, and constituted assets of his estate, which his executor had the right to recover for the payment of his debts.”

Weaver v. Weaver, 182 Ill. 287; 74 Am. St. 173.

In this case, the parties, mother and wife, respectively, were interpleaded by the Aetna Life Insurance Company, each claiming the benefit of a policy of insurance upon the life of one Weaver, procured in December, 1882.

The policy provided that:

“No assignment of this policy shall be valid unless made in writing and attached hereto, and a copy thereof furnished said company; and any claim against this company arising under this policy, made by any assignee, shall be subject to proof of interest.”

In the year following the issuance of the policy, and after Weaver’s marriage to the appellant, he went to the office of the company and there filled out a form of assignment to his mother, the respondent, and acknowledged the same, leaving one copy with the agent of the

company, and taking the other, with the policy, to his home. A short time previous to his death, he filled out another assignment to appellant, his wife, one copy of which was attached to the policy and delivered by him to her, and the other copy of assignment delivered to the company.

The mother contended that the first assignment, to her, was a perfected gift. That contention was denied by the Circuit Court, but upheld by the Court of Appeals. The Supreme Court reversed the Court of Appeals, and upheld the decision of the Circuit Court.

The two cases relied upon by defendant in error and cited in the District Court opinion as establishing the proposition that the delivery of the copy of the assignment by Gould to the Insurance Company constituted a valid delivery of the assignment, are readily distinguishable. In *M'Donough v. Aetna Life Insurance Company*, 78 N. Y. Supp. 216, the insured executed an assignment of the policy to the plaintiff and left the original assignment with the insurance company, while in the case at bar Gould retained the original assignment. In *Hurlbut v. Hurlbut*, 1 N. Y. Supp. 854, the insured executed an assignment of the policy, sent it to the insurance company and obtained from the insurance company an acknowledgment that it would pay the proceeds of the policy to the assignee. The insured then wrote to the assignee advising her of what he had done and that she might, from then on, "look to and hold the company as her debtor for the payment of the money". In the case at bar Gould did not tell Mrs. Dunlevy of the existence of the assign-

ment, and the company never agreed to pay the proceeds of the policy to Mrs. Dunlevy.

In the present case nothing was done by the insured further than to take the preliminary step looking to the assignment of the policy to the defendant in error. By leaving a copy of the assignment at the home office of the Insurance Company, Gould complied with a rule of the company which prescribed that

“no assignment of this policy shall be valid unless made in writing and attached hereto and a copy thereof furnished said company”.

This rule was for the benefit of the company,—not for the benefit of a possible assignee,—and in complying with it, Gould merely made it possible for him to make a valid assignment of the policy to Mrs. Dunlevy. That he did not consummate this, however, is certain from the facts that he never thereafter delivered the original assignment or a copy thereof to her; that he never thereafter delivered the original policy to her; that he paid all the premiums in the policy; that he never even advised her that he had made such an assignment to her and that she never knew or heard of such an assignment until twenty years later when she received a notification from the company (Tr. p. 211).

(b.) The fact that defendant in error was Gould's daughter and a minor in his custody did not dispense with the necessity of proving delivery. Gould's possession of the instrument was not for the benefit of defendant in error.

It is true that in some cases actual manual delivery of an instrument is unnecessary where the donee is a

minor. It is not true, however, that under this rule, gifts to minors are held valid without delivery. Delivery is as essential to the validity of such a gift as to any gift. And it is only in cases where delivery can be presumed from the attendant circumstances that actual manual delivery to the minor donee need not be shown.

The mere execution of an instrument by a father and a retention of the instrument will not alone form the basis for a presumption of delivery, or of a presumption that the retention of the instrument by the father was intended for the benefit of the minor. In such a case facts must appear from which it can be presumed that the father intended to make a present gift and intended that his possession of the instrument should inure to the benefit of the minor.

Jenkins v. Southern Ry. Co., 34 S. E. 355:

“Even if, in order to invest an infant of tender years with the title to land, it may not be absolutely essential that there should be in every instance a manual delivery to such infant himself, or to a third person as his agent, of a voluntary conveyance in which he is named as grantee, yet no effect can be given to an instrument of that character, which the maker thereof, after signing and acknowledging in the presence of witnesses, retains in his own custody, in the absence of satisfactory proof that it was his intention that such instrument should operate to immediately convey to the infant grantee the legal title to the premises therein described.”

Hall v. Waddill, 27 Sou. 937:

“Actual, manual tradition of the deed is not necessary, where the beneficiaries are infants, incapable of assent, and the grant wholly beneficial to them; there being a presumption of acceptance on their part in such cases. But delivery on the part of the grantors in some legal mode must nevertheless be shown, and direct, negative evidence of any such delivery defeats the grant, though a voluntary settlement, no matter how beneficial to infants.”

Where a father executes deeds to his minor child and retains possession of the deeds, the question as to whether or not his possession can be deemed the possession of the child, depends upon his intention at the time of executing the deeds. His subsequent actions with respect to the property mentioned in the deeds are often conclusive evidence as to what that intention was, and if it appears from his subsequent dealing with the property that after the execution of the deeds he continued to treat it as his own, it will be held that there was no delivery.

Cazassa v. Cazassa, 22 S. W. 560 (Tenn. 1893), quoting from the syllabus:

“A father executed two deeds to his 12 year old son,—one providing that title was to vest on a formal future delivery, no delivery being intended at the time; the other was of the property in which they were living. No member of the family was informed of the execution of the deeds, and, after the father’s death, they were found among his papers. Up to the time of his death he continued to rent, insure, and manage the property in his own name. *Held*, that there was never any delivery or present intention to deliver.”

The court said:

“Looking at all the facts disclosed in the record, and the situation and surroundings of the parties, we are of opinion that neither of these deeds was ever delivered, nor was there ever an actual, present intent to deliver them.

* * * * *

“We can see no evidence of delivery at any date subsequent to the making of the deeds, or of any intention to make such delivery; but the facts, so far as they go, negative the idea of any delivery. That the father never mentioned the making of the deeds to his wife, or to any of his friends; that he continued to use the property as before, paying taxes, making rental contracts, and receiving the rents, taking out insurance in his own name; that the deeds when found were not among his life and most valuable papers, but among his old bills and receipts,—all these facts negative the idea of any delivery, or of any present intention to deliver.”

In such cases there is no presumption that the parent, executing a deed of gift to his minor child and continuing to hold the same, intended a delivery. The burden is upon the person endeavoring to establish the gift to prove the intention of the donor. In the absence of any facts, the gift will fail for want of delivery. This is clear from the cases in which such gifts have been upheld.

Masterson v. Cheek, 23 Ill. Rep. 72:

“The delivery of a deed conveying land to an infant, or one incapable of formally accepting the same, may be shown by facts and circumstances indicating an intention on the part of the grantor to part absolutely with his title and vest it in the grantee. An acceptance will be presumed in such a case from the beneficial nature of the transaction.”

In this case the gift was upheld, but only because of the fact that the donor, subsequent to his execution of the deed, caused it to be recorded. The recordation was held to establish his intention to complete the gift and to constitute a substituted form of delivery.

In the present case it cannot be held that there was a delivery upon the theory suggested, for two reasons:

First, because there is no evidence or admitted fact which shows an intention upon the part of Gould to consummate a gift to Mrs. Dunlevy; secondly, because such an intention is distinctly negatived by facts that are admitted and by Gould's testimony.

The facts of the present case are strikingly similar in many aspects to the facts involved in the cases above cited.

Gould executed an assignment to Mrs. Dunlevy, his daughter, who was then thirteen years old and living in his custody, but Gould never delivered the policy or the assignment or a copy of either to Mrs. Dunlevy or to anyone else for her. Gould never told Mrs. Dunlevy of the existence of the policy or of the existence of any assignment in her favor, and she never knew or heard of such an assignment until sixteen years after it had been executed. Mrs. Dunlevy became of age five years after the execution of this assignment, and yet when she became of age, married and left the home of Gould, the latter did not even mention the existence of the assignment to her.

Far from evidencing any intention upon the part of Gould to make a present gift to Mrs. Dunlevy of

the policy, the above facts are almost irreconcilable with such an intention.

Gould's positive conduct, however, with respect to the policy does, on the contrary "negatives the idea of any delivery". He continued to pay all of the premiums on the policy both before and after his daughter became of age. He testifies positively that he never intended to assign the tontine benefits to his daughter and his testimony in this regard is uncontradicted. It will be noted that in the cases where such deliveries have been upheld, the question has usually arisen after the death of the donor, and in such cases the donor's testimony has been unobtainable, and for that reason the courts have been compelled to pay greater heed to presumptions arising from acts done by the parties. Whatever presumptions might be said to arise in this case should, we submit, fall before Gould's uncontradicted, unchallenged testimony.

2. Any Delivery Was Conditional Upon Gould's Death Within the Tontine Period.

The circumstances under which Joseph W. Gould deposited the copy of the assignment with the New York Life Insurance Company are set forth in the agreed statement (Tr. p. 210).

Joseph W. Gould's testimony in this regard was as follows:

"On or about the 27th day of June, 1893, being desirous of assigning said policy conditionally to my daughter, the plaintiff herein, I called at the

office of defendant New York Life Insurance Company, and requested R. H. McCreary, the agent there in charge of said office, to have said policy assigned to my said daughter on condition that I should die before said policy was paid in full, desiring to reserve to myself the right to collect any money to be paid on said policy at the maturity thereof if I should so long live.

“The agent of said company, the said R. H. McCreary, had the instrument set forth on pages 44 and 45 of Exhibit ‘A’ to the amended answer of defendant New York Life Insurance Company prepared, and I signed the same on the said R. H. McCreary’s assertion that it was an assignment to my said daughter of the said policy only on condition that I should die before the maturity of said policy, or before all the premiums were paid thereon. I did not read the assignment before executing the same, relying on the state of the said R. H. McCreary, the agent of said company, that I was assigning it conditionally in the manner before stated. I had no intention of making an absolute assignment of said policy to my said daughter, or to any other person.”

(Tr. p. 210.)

If the delivery of the copy of the assignment to the Insurance Company is to be deemed a delivery to the defendant in error, the ordinary case is presented of an escrow, that is to say, of the delivery of an instrument to a third person with instructions to the third person to deliver it to the grantee upon the happening of certain conditions. In the present instance what those conditions were is shown by Joseph W. Gould’s testimony, namely, that the assignment should not be deemed effective unless he, Gould, should die prior to January 22nd, 1909.

The doctrine of conditional deliveries is thoroughly established.

In

Ware v. Allen, 128 U. S. 590, 32 L. Ed. 563, 564, the rule is stated with reference to a promissory note as follows:

“We are of opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, *upon events to occur or to be ascertained thereafter.*”

In such cases the evidence of the condition must be furnished *dehors* the instrument; that is to say, an instrument absolute in form may well be shown to have been conditionally delivered.

In

Whitney v. Dewey, 80 Pac. 1117, decided by the Supreme Court of Idaho in 1905, it was said:

“It is beyond controversy that the evidence of delivery must come from without the deed. In other words, a deed never shows upon its face nor by the terms thereof a delivery, and parol evidence thereof must necessarily be admitted when the question of delivery arises.”

It is true that an instrument absolute on its face cannot be shown by parol testimony to have been conditionally delivered when the delivery is to the grantee direct and when the instrument relates to real property.

16 Cyc., 571;

1 Devlin on Deeds, par. 315;

Mowry v. Heney, 86 Cal. 471.

The courts have, however, held that even where the delivery is direct to the grantee, parol testimony may be introduced to show that the instrument was conditionally delivered when the instrument relates to personal property.

Blewitt v. Boorum, 37 N. E. 119; 142 N. Y. 357:

“Delivery of an instrument to a party thereto, when not relating to real estate, may be shown to have been on a parol condition that it should not take effect till the happening or doing of something, though the instrument be under seal, at least where it does not require a seal for its validity.”

These rules, however, give way entirely when the delivery is to a third person; that is to say, to an escrow holder. In such instances it may always be shown by parol testimony that the instrument was conditionally delivered and the terms of the delivery or the conditions of the delivery may likewise be shown by parol.

This is equally true as to instruments affecting real or personal property.

Nash v. Fugate, 38 Grat. 595; 34 Am. Rep. 780 (Va.):

“Counsel insist that there is no substantial distinction between a delivery directly to the obligee by all the parties signing the paper and a delivery by part

of them to the principal obligor and by the latter to the obligee. In either case the delivery is absolute and the condition void. A moment's reflection will, however, show there is a wide distinction between the two cases. A deed cannot be delivered as an escrow to the party on whose behalf it is made; no matter what may be the form of the words used the delivery is absolute, and the deed takes effect immediately. An escrow, on the other hand, *ex vi termini*, is a deed delivered to some third person, a stranger, to be by him delivered to the grantee upon the performance of some condition. When the books speak of the delivery to a stranger as an essential to an escrow, it is in contradiction to a delivery to the party in whose behalf the deed is made."

Dorr v. Middlebury, 65 S. E. 97 (W. Va. 1909):

"The cases cited, and, indeed, all the cases in which the question is presented, draw the distinction more or less clearly, between a delivery in escrow or a conditional delivery to the grantee, and cases where the grantee has in some way obtained manual possession of the deed, but there has been no intentional delivery of the deed for any purpose, for, as some of our cases hold, delivery is always a question of intention of the parties, and if there has been no intention to deliver, if the minds of the parties have never met on the subject of delivery, there is no delivery, no intention to pass the title on any terms or conditions, hence no contract, no deed."

Defendant in error does not contend that there was ever any delivery of the assignment from Joseph W. Gould to herself other than the deposit of the copy of the assignment with the New York Life Insurance Company. It cannot be denied that if that transaction constituted a delivery at all the copy must be deemed to have

been left with the New York Life Insurance Company as escrow holder for defendant in error. From what took place at the time this copy was left with the New York Life Insurance Company by Joseph W. Gould it is clear this delivery was a conditional delivery and that the assignment was to take effect only upon the condition that Gould should die prior to the expiration of the tontine period; that is to say, prior to January 22nd, 1909. The condition not having been fulfilled, the defendant in error would, in any event, be unable to benefit by such a delivery.

3. By the Assignment Joseph W. Gould Did Not Intend to Give Defendant in Error the Tontine Benefits of the Policy and Therefore Defendant in Error Could Not Have Acquired Title to the Tontine Benefits Through the Assignment.

(a.) The intention to give is an essential to every valid gift *inter vivos*.

To accomplish a valid gift *inter vivos*, two elements are necessary: There must be a delivery from the donor to the donee and this delivery must be accompanied by a present intention upon the part of the donor to vest title in the donee.

20 Cyc., 1198:

“The rule is well settled, however, that delivery need not be made to the donee personally, but may be made to a third person as agent or trustee, for the use of the donee, and under such circumstances as indicate that the donor relinquishes all right to

the possession or control of the property, and intends to vest a present title in the donee.”

14 American and Eng. Cyc. of Law, 1020;

20 Cyc., 1194;

Thornton on Gifts and Advancements, secs. 222, 223, 224.

It becomes peculiarly necessary to establish this intention upon the part of the donor when delivery is to a third person for the donee. In such a case no evidence of intention can be gathered from the act of the donor in parting with the possession because the possession is not parted with direct to the donee and must be given by the third person to the donee in accordance with instructions from the donor. How this intention may be shown is pointed out in

Ruiz v. Dow, 113 Cal. 490,

where it was held by the Supreme Court of California:

“The intention of the husband to make a present gift to his wife by a deed delivered to a third person, may be proved by his own declarations, whether made before or after the transaction.”

(b.) The Insurance Company would not in any event be bound by the absolute form of the assignment.

The assignment from Joseph W. Gould to the defendant in error was absolute in form.

As has already been pointed out, the evidence of a conditional delivery must necessarily come from without the instrument. The fact that the instrument which Joseph W. Gould placed in the hands of the New York Life

Insurance Company purported to convey all interest of whatever character in the policy, therefore, cannot be said to be evidence that he intended a gift of the tontine benefits as well as of the death benefits. If, as a matter of fact, he delivered the assignment to the New York Life Insurance Company with instructions that amounted to directions to the company to deliver the assignment only in the event that he should die within the tontine period, it would make no difference whether the assignment referred particularly to the tontine benefits or to his entire interest in the policy.

The familiar case of an escrow is where an owner of real property executes a conveyance absolute in form and places it in the hands of a third person to be delivered upon the happening of a certain contingency. In such a case it cannot be argued that because the conveyance is absolute in form it is to be deduced therefrom that the escrow was free from the conditions.

In the present case it is clear that if the condition which Joseph W. Gould testifies he made upon the delivery of the assignment to the New York Life Insurance Company ever occurred, that is to say, if his death occurred during the tontine period, then and in that event it was his wish that Mrs. Dunlevy should receive the full benefits from the policy. If that condition were fulfilled, the possibility of tontine benefits would have expired and he then desired that she should have the complete title to the policy and its proceeds.

Assuming, however, that on its face the assignment could be said to show an intention by Joseph W. Gould

to transfer the tontine benefits as well as the death benefits of the policy, nevertheless it is permissible for the Insurance Company to show the contrary by parol testimony. The assignment was from Joseph W. Gould, as assignor, to defendant in error, as assignee, and the plaintiff in error was an entire stranger to it.

That a stranger to a contract may contradict its terms by parol testimony is unquestioned.

17 Cyc., 749;

Central etc. Co. v. Good, 120 Fed. 793, 798, 799;

Sigua Iron Co. v. Greene, 88 Fed. 207;

O'Shea v. R. R. Co., 105 Fed. 559, 563;

Shattuck etc. Co. v. Gillelen, 154 Cal. 778, 784;

Smith v. Goethe, 159 Cal. 628, 632;

Bickerdike v. State, 144 Cal. 681, 691;

Dunn v. Price, 112 Cal. 46, 51.

Dunn v. Price, usually cited on this point, contains the following statement:

“It will be observed that the rule thus declared applies only as between the parties to the instrument and their representatives or successors in interest. It cannot be invoked by strangers to the instrument. ‘The rule that parol testimony may not be given to contradict a written contract applies only in suits between the parties to it or their privies. In a contention between a party to an instrument and a stranger, either can give parol testimony differing from the contents of the instrument.’ ”

Gould's testimony stands uncontradicted. Under the foregoing rule this testimony was admissible and competent to show that it was not his intention by the assignment to transfer to Mrs. Dunlevy the tontine benefits

which arise from the policy, but that he intended to give to her only the death benefits and to retain to himself the tontine benefits.

B.

THE DEFENDANT IN ERROR WAS BARRED BY THE PROCEEDINGS IN PENNSYLVANIA.

1. The Dual Character of the Proceedings in Pennsylvania Considered.

An accurate conception of the character of the proceedings in Pennsylvania is essential to a correct solution of the question presented.

The attachment under which the New York Life Insurance Company was garnished issued upon a judgment obtained by Boggs & Buhl against the defendant in error in an action entitled *Boggs & Buhl v. Effie J. Dunlevy*, in 1907. *It is of the utmost importance to note that in this action the defendant in error was personally served in the State of Pennsylvania* (Tr. p. 59). It is not disputed therefore that the New York Life was garnished under a judgment binding upon Mrs. Dunlevy; that is to say, under a judgment obtained in an action in which the Pennsylvania court had undisputed jurisdiction, by personal service, over Mrs. Dunlevy.

The Pennsylvania statutes, under which this garnishment was levied, are essentially the same as those in California. Those statutes under which this particular garnishment was levied, are as follows:

Act of June, 1836, Section 32;
2 Purdon's Digest, 13th Ed., p. 1532.

“45. The proceedings to levy an execution upon stock, debts and deposits of money belonging or due to the defendant shall be as follows, to wit:

* * * * *

“48. In the case of a debt due to the defendant or of a deposit of money made by him, or of goods or chattels pawned, pledged or demised, as aforesaid, the same may be attached and levied in satisfaction of the judgment in the manner allowed in the case of a foreign attachment.”

The provision above referred to respecting foreign attachments is as follows:

Act of June 13th, 1836, section 48;

Vol. 2, Purdon's Digest, 13th Ed., p. 1718:

“15. In the case of personal property, the attachment shall be executed as follows, to wit:

* * * * *

“IV. In all other cases of incorporeal hereditaments, the attachment shall be executed by leaving a copy of the writ with the person or persons who may be liable to the payment of money to the defendant, or who may be charged with, or otherwise liable to the defendant in respect of such hereditaments, and if there be no such person, by publication, as directed in the case of houses or lands of which there shall be no person in possession, as aforesaid.”

It will therefore be seen that first of all there was, in this case, the simple case of a valid garnishment of money in the hands of a creditor of a judgment debtor.

When the New York Life Insurance Company was garnished by Boggs & Buhl it knew that Joseph W. Gould was disputing the validity of his assignment

to Mrs. Dunlevy of the tontine benefits under the policy. Therefore it could not pay the proceeds to Boggs & Buhl without facing the danger of being compelled again to pay to Joseph W. Gould. Knowing these facts, the New York Life Insurance Company did what any creditor would have done under such circumstances: *it paid the moneys into the custody of the Pennsylvania court.*

After the payment of the moneys into court that court ordered Joseph W. Gould, Boggs & Buhl and Mrs. Dunlevy, the defendant in error herein—but *not the New York Life Insurance Company*—to interplead. It ordered a feigned issue made between these parties to determine the question as to whether or not Joseph W. Gould ever assigned the tontine benefits of the policy to Mrs. Dunlevy. This feigned issue was framed pursuant to the Pennsylvania statutes.

Act of May 26th, 1897;

2 Purdon's Digest, p. 1551:

“71. Whenever goods or chattels have been levied upon or seized by the sheriff of any county under any execution or attachment process issued out of any court of this commonwealth, and the sheriff has been notified that said goods and chattels, or any part of them, belong to any person or persons other than the defendant or defendants in said execution or process, said sheriff shall enter a rule in the court out of which said execution or process issued on the supposed owner, (hereinafter called the claimant), to show cause why an issue should not be framed to determine the ownership of said goods and chattels; notice of said rule shall be given to the plaintiff and defendant in

said execution or process, the claimant, and the person or persons found in possession of the goods and chattels levied upon or seized.”

In this feigned issue proceeding, Joseph W. Gould was served with notice personally; so also was Boggs & Buhl. Joseph W. Gould and Boggs & Buhl and other intervening creditors of Mrs. Dunlevy appeared in the proceeding. Mrs. Dunlevy, however, was served with notice out of the State of Pennsylvania and in the State of California and she never appeared in the proceedings.

With the foregoing outline of the character of the proceedings in Pennsylvania, we proceed to a discussion of the two reasons upon which we believe it must be held that Mrs. Dunlevy's right to recover in this action was barred by those proceedings.

2. The Payment of the Money into the Pennsylvania Court Bars a Recovery Irrespective of the Feigned Issue Proceedings.

The holding of the District Court rested entirely upon the proposition that the Pennsylvania court was without jurisdiction of Mrs. Dunlevy *in the feigned issue proceedings*.

But it is submitted that the New York Life Insurance Company was in no way concerned in those proceedings. The New York Life Insurance Company, having been garnished by one of Mrs. Dunlevy's creditors under a valid judgment which was binding upon her, had the right to pay what it owed Mrs.

Dunlevy into court. It did pay the proceeds of the policy into court and having done so it was no longer concerned with the ultimate disposition of the money.

- (a.) The law of Pennsylvania gives a garnishee a right to pay his debt into court and having done so he is protected by such payment from a subsequent action by the judgment debtor.

We quote the following Pennsylvania cases as establishing the above principle conclusively:

Singerly's Exrs. v. Woodward, 8 Weekly Notes of Cases, 339 (Pa. 1880).

Carson obtained a judgment against Singerly for \$8142.94 in January, 1873. In January, 1874, Woodward, having obtained a judgment against Carson, garnished Singerly. Singerly did not pay the money into court and was thereupon sued as garnishee by Woodward. The question arose as to whether or not Woodward was entitled to interest from the date of the garnishment. The court held that he was because Singerly had not availed himself of his right to pay the money into court when he was garnished. The court said:

“Where one against whom an action is brought has notice of an equitable assignment of the claim if he does not dispute the debt his only protection against being charged with interest is payment into court, and this whether the claimants be one or many.”

In

Wilson v. Mayhew, 6 Phila. Rep. 273,

the facts and the ruling of the court appear from the following quotations from the opinion:

“The debt levied by this execution is on a judgment obtained in the name of the husband and wife to the use of the wife, who claims it as her property. The defendant makes known to us that the debt has been attached in his hands at the suit of a creditor of the husband, upon an attachment execution issued out of the District Court for the City and County of Philadelphia, and he asks to have the money paid into court to abide the issue of the attachment execution against the husband, to protect him from a double payment.

* * * * *

“It is not now the husband claiming this debt, but a creditor of the husband, and the defendant asks us to protect him from a double payment. This we can do by ordering the money to be paid into court to abide the issue of the attachment execution in which the rights of the parties must be tried.”

Stockham v. Pancoast, 1 Penn. Dist. Rep. 135
(Pa. 1892).

In this case a garnishee admitted in his answer to the garnishment that he was indebted to the judgment debtor, but averred that he had notice from subsequent attaching creditors of the judgment debtor that the first judgment against the judgment creditor under which he had been garnished, was fraudulent and void as to them. The garnishee therefore prayed to be allowed to pay the money into court and the court permitted him to do so, saying:

“Where a fund in the hands of a garnishee is attached by a judgment creditor, and the garnishee then receives notice from a subsequent judgment creditor, who also claims the fund, that the former judgment is void through fraud, the gar-

nishee will be allowed to pay the money into court; and a rule for judgment against the garnishee will be discharged.”

Fuller v. Bleim, 9 Weekly Notes of Cases, 574 Pa. 1880;

Brooks v. Salin, 14 Weekly Notes of Cases, 390; Pa. 1884;

Cunningham v. O’Keefe, 19 Weekly Notes of Cases, 575; Pa. 1887.

The foregoing authorities show that the rule is the same in Pennsylvania as in the other states of the Union.

20 Cyc., 1092:

“In some jurisdictions the statutes provide that a garnishee may protect himself from liability by payment of the indebtedness, or delivery of the property of defendant in his possession, to the officer serving the writ. In some jurisdictions, where the garnishee has property or evidences of indebtedness in his possession belonging to the principal defendant, the court may, on proper application, order the garnishee to deliver such property to the sheriff.

“The statutes usually provide that a garnishee may relieve himself from liability both to plaintiff and the principal defendant by paying the money, or delivering the property into court after he has been served with the writ of garnishment. Some of the statutes provide that the court may order the money or property to be deposited in court, where the disclosure shows that the garnishee is possessed of property of or is indebted to the principal defendant.”

(b.) Under the Pennsylvania law the garnishee is not a proper party to, and is not concerned with the outcome of, the feigned issue proceeding.

We have shown that under the interpretation that has been given the Pennsylvania garnishment statutes by the courts of that state the garnishee is entitled to pay into court, and his receipt from the prothonotary protects him against a subsequent suit by the judgment debtor. In other words, the Pennsylvania cases hold that, when the garnishee has reason to believe there are conflicting claims as to the ownership of the funds in his hands, he may pay the money to the prothonotary and thus protect himself against a possible double payment.

As we have already pointed out, the Pennsylvania statutes provide for a feigned issue proceeding such as was followed in this case. But this proceeding does not concern the garnishee. It is a matter entirely between the judgment debtor and those who claim the fund against him. By paying the money into court the garnishee admits that he has no interest in the fund and is desirous of paying it over to the real owner.

The courts of Pennsylvania have distinctly held that it is error to make the garnishee a party to one of these feigned issue proceedings. This was directly held in

Fish v. Keeney, 91 Pa. St. Rep. (10 Norris) 138:

“A feigned issue should be framed between the opposing claimants of the money, so far as they

are known to the court. It was error to make a garnishee a party to the issue, and subject him to the expenses and costs, when he made no claim to the fund and was in no default."

* * * * *

"Thus the facts are succinctly these: Mr. Seymour admitted the money to be in his hands. He made no claim to it, and was ready to pay it over to whomsoever the court should adjudge was entitled thereto. Fish claimed it by virtue of his attachment, as the property of Spencer; Keeney, Cady and Knight, severally claimed it by right paramount to Spencer's. The issue should have been formed between the opposing claimants of the money, so far as they were known to the court. The garnishee should not have been made a party to the issue. He should not have been subjected to the expenses and costs of a suit when he made no claim to the money, and was in no default. The injustice resulting to him by being made a party to the issue, is shown by the fact that he was thereby subjected to a large bill of costs, although the sum for which the verdict was rendered against him, is the precise amount he admitted to be in his hands, and was at all times ready to pay.

* * * * *

"No fact is shown to justify the court in ordering the attaching creditor and the garnishee to unite as one party in the issue, nor in entering a joint judgment against them thereon. By either paying the money into court, or by averring his willingness and readiness so to do, he should be protected against all costs of litigation between the claimants."

In

Good v. Grant, 76 Pa. St. Pre. (26 P. F. Smith) 52,

Mr. Justice Mercur, speaking for the Supreme Court of Pennsylvania in 1874, said:

“This case seems to have been tried in a very irregular manner. The defendants in error issued an attachment execution against the plaintiff in error as garnishee of Peter Dickinson. At this time Samuel Dickinson held several judgments against Good. He admitted his indebtedness upon them. The court say in their charge, ‘when the money became due the court directed the garnishee to pay the money into court, and this attachment execution is now being tried for the purpose of determining whether any portion of the money paid into court is the property of said Peter Dickinson.’ The contest then really was between the defendants in error as attaching creditors of Peter Dickinson as one party, and Samuel Dickinson as the other party. The issue should have been formed and tried between them. By paying the money into court, Good admitted his liability to pay the judgment; although it is said the ‘court directed’ him so to pay it in, we will not assume this direction to have been made without his request. *The garnishee should then have been relieved from further costs. The contest should have been carried on in form, as it was in fact, between the two parties claiming the fund.*”

- (c.) If defendant in error was harmed by the payment of the money to Gould, her only recourse would be against the prothonotary and not against the Insurance Company.

After the Insurance Company paid the fund to the prothonotary it had no further interest as to what became of the fund.

The prothonotary ultimately paid the money, which the New York Life Insurance Company had placed in his hands, to Joseph W. Gould pursuant to the judgment in the feigned issue proceedings.

If the judgment in the feigned issue proceedings was void by reason of the want of jurisdiction of the Pennsylvania court over Mrs. Dunlevy, then the prothonotary was wrong in making such payment. If Mrs. Dunlevy was not bound by the judgment in the feigned issue proceedings she could sue the prothonotary for having made this unauthorized payment. But she could not sue the New York Life Insurance Company.

In

Shriver v. Harbaugh, 2 Pitts. Rep. (Crumrine)
109,

the defendants were sued for their refusal to respond to an attachment. It was shown that property of the attaching creditor had been properly levied upon and that the sheriff should have taken possession. It was shown that the garnishees offered to deliver the property into the possession of the sheriff but that the latter declined to take possession and sought to hold the property in the hands of the garnishees by an ordinary garnishment notice. The property being susceptible of manual delivery, it was held that the attempted garnishment could not hold. In giving judgment for the defendants the court said:

“If plaintiffs have sustained any damage, their remedy would be against the sheriff.”

So, in the present case, if defendant in error has sustained any damage, her remedy is against the prothonotary. The plaintiff in error ought not to be compelled to answer for the latter's mistake in paying out money in his custody—if, in fact, he paid under a void judgment in the feigned issue proceedings.

3. Defendant in Error is Bound by the Pennsylvania Judgment in the Feigned Issue Proceedings.

The laws of Pennsylvania provide for constructive service upon a non-resident defendant, and it has been held that these laws are constitutional when applied in cases where the Pennsylvania courts have jurisdiction of the subject matter. The Pennsylvania statute on the subject is contained in the

Act of April 6, 1859, P. L. 387, par. 1:

“It shall be lawful for any court of this commonwealth having jurisdiction, upon the special motion of the plaintiff or plaintiffs, in any suit in equity which has been or shall be instituted therein, concerning goods, chattels, lands, tenements or hereditaments, or for the perpetuating of testimony concerning any lands, tenements and so forth, situate and being within the jurisdiction of such court, or concerning any charge, lien, judgment, mortgage or encumbrance thereon, or where the court acquired jurisdiction of the subject matter in controversy by the service of its process (on) one or more of the principal defendants, to order and direct that any subpoena, subpoenas, or other process to be had in such suit, be served upon any defendant or defendants therein, then residing or being out of the jurisdiction of such court, wherever found; and upon affidavit of such service had to proceed as fully and effectually as if the same had been made within the jurisdiction of such court; Provided, that it shall appear to such court, by affidavit, affidavits, or other documents applicable to the purpose, before making such order, in what place or county such defendant or defendants reside, or are, or probably may be found, and if such place be without the United States, whether there are any officers of the United States residing thereat, or near thereto, and by what means such service may be authenticated and, provided, that such order limit a time, de-

pending on the place where such process is to be served, after the service thereof, within which compliance with the requirements thereof must be made by such defendant, or defendants; such process to be returnable at such time after the service thereof, as the court shall, by special order, direct: And further provided, that when such process shall be served, such defendant or defendants shall also be served with a copy of the order authorizing the service thereof, and a copy of the bill or petition, if such process be a subpoena thereon, but if not, a statement of the substance and object of the proceeding, whereon the same is founded; And provided also, that the affidavit of such service of process and copies, or statements aforesaid, if such service be had within the United States may be made and taken before any officer of the United States, or of any of the States and Territories thereof, authorized to administer an oath; and if such service be had without the United States, the same shall be authenticated as such court shall by special order direct.”

The record shows that the service upon Mrs. Dunlevy in the feigned issue proceeding was in strict compliance with the foregoing statute (Tr. pp. 135-144).

It only remains to show that this was a case in which the Pennsylvania courts had jurisdiction of the *res*.

In the present case the District Court held that the Pennsylvania court was without jurisdiction to render the judgment in the feigned issue proceedings because it had no personal jurisdiction of Mrs. Dunlevy and because that court adjudged that no debt was due from the Insurance Company to Mrs. Dunlevy, but that Gould owned the insurance policy and its proceeds. But the question of jurisdiction of a State court to render a judgment based on publication of summons

where the only property within the State is a debt due from a non-resident of that State to another non-resident, has been decided by the Supreme Court of the United States and is not now open to controversy.

That for the purpose of garnishment the situs of a debt is the place where the debtor is found is now settled law.

In

Harris v. Balk, 198 U. S. 215; 49 L. Ed. 1023, one Epstein, a resident of Maryland, had a claim against Balk, a resident of North Carolina. One Harris, also a resident of North Carolina, owed a debt to Balk. Harris made a trip to Baltimore and while there was served with attachment process in proceeding against Balk and Harris brought in conformity with the laws of Maryland. Balk did not appear in this proceeding and there was no personal service of process upon him. The only service had was constructive in accordance with the laws of Maryland. A default judgment was entered against Balk and Harris and Harris paid Epstein's attorney the amount of his debt to Balk. Thereafter, suit was brought in the North Carolina courts by Balk against Harris. Harris set up the Maryland judgment as a defense, but the North Carolina court gave judgment in favor of Balk, holding that the Maryland judgment was void for want of jurisdiction. Mr. Justice Peckham, who rendered the decision in the United States Supreme Court, held that the Maryland judgment was valid even though obtained by constructive service of process against Balk because the court had jurisdiction of the debt due from Balk to Harris.

The case is directly in point here as appears from that portion of the decision on pages 226 and 227:

“It ought to be and it is the object of courts to prevent the payment of any debt twice over. Thus, if Harris, owing a debt to Balk, paid it under a valid judgment against him, to Epstein, he certainly ought not to be compelled to pay it a second time, but should have the right to plead his payment under the Maryland judgment. It is objected, however, that the payment by Harris to Epstein was not under legal compulsion. Harris in truth owed the debt to Balk, which was attached by Epstein. He had, therefore, as we have seen, no defense to set up against the attachment of the debt. Jurisdiction over him personally had been obtained by the Maryland court. As he was absolutely without defense, there was no reason why he should not consent to a judgment impounding the debt, which judgment the plaintiff was legally entitled to, and which he could not prevent. There was no merely voluntary payment within the meaning of that phrase as applicable here.”

Harris v. Balk is affirmed in an opinion written by Mr. Justice Holmes in

Louisville & Nashville Railroad Co. v. Deer, 200
U. S. 176; 50 L. Ed. 427.

The opinion is very short and is in the following words:

“This is an action to recover a debt admitted to have been due to the plaintiff, the defendant in error. But it was agreed in the trial court that a suit was brought by one Brock against the plaintiff in Florida, in which the railroad company, the present plaintiff in error, was summoned as garnishee, judgment was recovered against the latter as such for the sum now in suit, and the sum paid by it

into court, all before the present suit was begun. The proceedings in Florida were strictly in accordance with the laws of that state. The railroad company did business there, and was permanently liable to service and suit, and the defendant, the present defendant in error, was notified by such publication as the statutes of Florida prescribed. He was not, however, a resident of the state, but lived in Alabama, and the supreme court of the latter state affirmed a judgment in his favor on the ground that the Florida court had no jurisdiction to render the judgment relied on as a defense.

“Whatever doubts may have been felt when this case was decided below are disposed of by the recent decision in *Harris v. Balk*, 198 U. S. 215; 49 L. ed. 10, 23; 25 Sup. Ct. Rep. 625. There the garnishee was only temporarily present in Maryland, where the first judgment was rendered, and the defendant in that judgment was absent from the state, and served only as the defendant in error was served in Florida. Yet the Maryland judgment was held valid, and a decision by the supreme court of North Carolina, denying the jurisdiction of the Maryland court, was reversed. In the present case the railroad company was permanently present in the state where it was served. In view of the full and recent discussion in *Harris v. Balk*, we think it unnecessary to say more.”

Conceding, therefore, that the feigned issue proceedings were entirely distinct from the original suit by *Boggs & Buhl* against *Mrs. Dunlevy*, but bearing in mind that the proceedings were had strictly in accordance with the statutes of Pennsylvania and that *Mrs. Dunlevy* was personally served with notice thereof within the State of California, we submit that the judgment of the Pennsylvania court that *Gould*

and not Mrs. Dunlevy owned the proceeds of the policy, is a complete bar to the present action.

The principle is established in

Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565,

that where property, real or personal, is situated within a State and judgment is rendered by the State court based on constructive service of process, the judgment is valid and determines the title to the property involved. So in the present case, had the question involved been the ownership of tangible personal property situated in Pennsylvania, the judgment of the Pennsylvania court to the effect that Gould was the owner thereof and that Mrs. Dunlevy had no interest therein, would unquestionably have been binding on the defendant in error here. And we submit that the rule in regard to choses in action and choses in possession is not at all different. The debt which the Insurance Company owed under its policy either to Gould or to Mrs. Dunlevy was within the territorial jurisdiction of the Pennsylvania court.

Harris v. Balk, *supra*;

Louisville & Nashville R. R. Co. v. Deer, *supra*.

Weiner v. American Ins. Co. of Boston, 73 Atl. 443
(Pa. 1909):

“A debt by a foreign corporation to another foreign corporation may be garnisheed in an action against the creditor in Pennsylvania.”

Gould appeared as the plaintiff claiming title thereto and asking that his title be quieted as against Mrs. Dunlevy. He caused constructive process to be served

upon Mrs. Dunlevy in the manner authorized by the Pennsylvania statutes.

The situs of the debt in the State of Pennsylvania and the constructive service of process gave the Pennsylvania court power to determine whether Gould owned it or whether it belonged to Mrs. Dunlevy. Under the ruling of the learned District Judge, however, the Pennsylvania court had power to decide in favor of Mrs. Dunlevy but not to decide against her. We submit this is not a proper construction of *Pennoyer v. Neff*, *supra*. The court either had or had not jurisdiction of the cause and having jurisdiction, it could decide the case the one way or the other. It has decided that Mrs. Dunlevy did not own the tontine benefits of the insurance policy in question and its decision is binding upon her.

AN AFFIRMANCE OF THE JUDGMENT WILL COMPEL A SECOND PAYMENT.

The striking feature of this case is that the Insurance Company has once paid its liability upon the policy of insurance in suit. It paid it under process of a court of competent jurisdiction. No claim is made that the Insurance Company knowingly or otherwise took an unfair advantage of defendant in error in paying the money into the hands of the prothonotary of the Pennsylvania court. Had that court held in favor of Mrs. Dunlevy, her Pennsylvania creditors would have been paid. That court, however, compelled the Insurance Company to pay the money to it and later the jury, by its verdict, took the proceeds of the policy from her

creditors and gave it to her father. In the present action Mrs. Dunlevy, having so far successfully evaded her Pennsylvania creditors, seeks to compel the Insurance Company to pay the proceeds of the policy a second time. Such a result is intolerable.

In the language of Mr. Justice Peckham, above quoted:

“It ought to be and it is the object of courts to prevent the payment of any debt twice over.”

The judgment should be reversed.

Dated, San Francisco,

February 25, 1914.

Respectfully submitted,

E. J. McCUTCHEN,

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CHARLES W. WILLARD,

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No. 2349

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NEW YORK LIFE INSURANCE
COMPANY (a corporation), and
JOSEPH W. GOULD,

Plaintiffs in Error,

vs.

EFFIE J. GOULD DUNLEVY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR, EFFIE J. GOULD DUNLEVY.

Topic I.

When issues of fact in any civil cause before a federal District Court, are tried and determined by the court without the intervention of a jury, and neither exceptions to the rulings of the court, made during the progress of the trial, are duly presented by a bill of exceptions, nor special findings filed, the scope of review by the Circuit Court of Appeals is limited to two questions: The jurisdiction of the trial court, and the sufficiency of the complaint to sustain the judgment.

SECTION 1.

STATEMENT OF FACTS BEARING UPON THE PROPOSITION
SET FORTH IN TOPIC I.

A trial by jury was waived by a stipulation in writing entered into by the plaintiff in error and the defendant in error, and filed with the clerk of the court (Transcript, page 195). J. W. Gould, one of the defendants in the District Court, did not waive a jury trial. He was served with summons within the State of California before this cause was removed from the State of California courts to the federal District Court (Transcript, pages 24 and 10). He has never appeared in this action, except specially (Transcript, pages 18-23 inc.). Judgment was entered in favor of the defendant in error and against the plaintiff in error (Transcript, pages 196-197 inc.). The trial court denied a motion for a new trial (Transcript, page 220). No exceptions were made to rulings of the court during the progress of the trial, and presented by bill of exceptions (Transcript, pages 206 to 222 inc.). *No findings have been filed.* Only one of the two defendants, namely, New York Life Insurance Company, is a party to this writ of error (Transcript, page 225).

SECTION 2.

AN OUTLINE STATEMENT OF THE POINTS OF LAW WHICH
WILL BE MADE BY THE DEFENDANT IN ERROR IN SUP-
PORT OF THE PROPOSITION OF TOPIC I.

The proposition of Topic I is true because:

(a) Before the Act of March 3, 1865 (Sections 649, 700, Revised Statutes), when issues of fact in a

civil cause, before a federal Circuit Court were tried and determined by the court without intervention of a jury, the scope of review by the Circuit Court of Appeals was limited to the two questions: jurisdiction of the trial court, and the sufficiency of the complaint (see Section 3).

(b) The purpose of the Act of March 3, 1865, was to enlarge the scope of review (see Section 4).

(c) The Act of March 3, 1865, sets forth certain procedure whereby the scope of review could be enlarged (see Section 5).

(d) The procedure outlined by the Act of March 3, 1865, must be strictly complied with if the scope of review is to be enlarged (see Section 6).

(e) The provision of the Act of March 3, 1865, requiring that a stipulation in writing, signed by the parties, and filed with the clerk, waiving a jury trial, must be complied with, if the scope of review is to be enlarged (see Section 7).

(f) The provisions of the Act of March 3, 1865, requiring that exceptions made to the rulings of the court during the progress of the trial, be duly presented by bill of exception, and special findings be filed, must be complied with if the scope of review is to be enlarged (see Section 8).

(g) When the provisions of the Act of March 3, 1865, are not complied with the scope of review of the Circuit Court of Appeals is the same as prior to that enactment, to wit: jurisdiction of the trial court and the sufficiency of the complaint (see Section 9).

(h) The trial court had jurisdiction over the parties and the subject matter (see Section 10).

(i) The complaint is sufficient to sustain a judgment (see Section 11).

SECTION 3.

BEFORE THE ACT OF MARCH 3, 1865, WHEN ISSUES OF FACT IN A CIVIL CAUSE, BEFORE A FEDERAL CIRCUIT COURT, WERE TRIED AND DETERMINED BY THE COURT, WITHOUT INTERVENTION OF A JURY, THE SCOPE OF REVIEW OF THE CIRCUIT COURT OF APPEALS WAS LIMITED TO TWO QUESTIONS: JURISDICTION OF THE TRIAL COURT, AND SUFFICIENCY OF THE COMPLAINT TO SUSTAIN THE JUDGMENT.

The rule of law stated in the proposition of this section is ably discussed by the Supreme Court in the case of *Campbell v. Boyreau*, 21 How. (U. S.) 223, decided in 1859. Chief Justice Taney in his opinion states:

“ * * * Indeed, under the Acts of Congress establishing and organizing the Courts of the United States, it is clear that the decision could not be otherwise; for, so far as questions of law are concerned, they are regulated in their modes of proceeding according to the rules and principles of the common law, with the single exception of the courts in the State of Louisiana, of which we shall presently speak. *And by the established and familiar rules and principles which govern common law proceedings, no question of the law can be reviewed and re-examined in an appellate court upon writ of error (except only where it arises upon the process, pleadings, or judgment, in the cause), unless the facts are*

found by a jury, by a general or special verdict, or are admitted by the parties, upon a case stated in the nature of a special verdict stating the facts, and referring the questions of law to the court.

*The finding of issues in fact by the court upon the evidence is altogether unknown to a common law court, and cannot be recognized as a judicial act. Such questions are exclusively within the province of the jury; and, if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. * * * And as this court cannot regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. Consequently, as the circuit court had jurisdiction of the subject-matter and the parties, and there is no question of law or fact open to our re-examination, its judgment must be presumed to be right, and on that ground only affirmed. * * **

SECTION 4.

THE PURPOSE OF THE ACT OF MARCH 3, 1865, WAS TO ENLARGE THE SCOPE OF REVIEW IN THE SITUATION, ASSUMED BY THE PROPOSITION OF SECTION 3.

The court in the case of *Boogher v. New York Life Insurance Co.*, 13 Otto (U. S.) 90, at page 96, sets forth the statement that

“To * * * give parties the right of review here, if they submitted their issues to a trial

by the court, the Act of 1865, 13 Stat. at L. 501, sec. 4; Rev. Stat., secs. 649, 700, was passed. *In this way it was provided that issues of fact in civil cases in the circuit court might be tried and determined by the court, without the intervention of a jury, 'whenever' the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts * * * shall have the same effect as the verdict of a jury.* Provision was also made for presenting the rulings of the court in the progress of the trial for review here by bill of exceptions, and when the finding was special that the review might extend to the determination of the sufficiency of the facts found to support the judgment."

SECTION 5.

THE ACT OF MARCH 3, 1865, SETS FORTH CERTAIN PROCEDURE WHEREBY THE SCOPE OF REVIEW OF THE CIRCUIT COURT OF APPEALS MAY BE ENLARGED.

The act of March 3, 1865, has been re-enacted as Sections 649, 700, Revised Statutes.

Boogher v. New York Life Ins. Co., *supra*.

These two sections of the Revised Statute are as follows:

SECTION 649.

"Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which

may be either general or special, shall have the same effect as the verdict of a jury.”

SECTION 700.

“When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error, or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.”

There are certain decisions to the effect that these sections of the Revised Statutes refer to trials had in the federal Circuit Courts, but not to trials had in the federal District Court.

Rogers v. United States, 141 U. S. 548;

Wear v. Mayer, 6 Fed. 658.

These decisions were rendered prior to the Judicial Code of March 3, 1911. By this enactment the functions of the federal Circuit Court were transferred to the federal District Court.

United States v. New Departure Mfg. Co, 195 Fed. 778.

Moreover, the cause now before the court was originally in the federal Circuit Court (Transcript, page 11) and was transferred to the federal district under the Judicial Code above referred to.

Section 700 makes a specific statement that if the procedure is complied with certain matter "may be reviewed by the Supreme Court." This does not exclude writ of error and appeal to the Circuit Court of Appeals from the force of the Act. It has been repeatedly decided that the sections do refer also, to writs of error and appeals to the Circuit Court of Appeals.

Erkels v. United States, 169 Fed. 623.

An inspection of Sections 649 and 700, Revised Statutes, set forth in full above, discloses that the procedure necessary to enlarge the scope of review of Circuit Court of Appeals is:

1. To file with the clerk of the court a stipulation in writing, waiving a jury.

2. (a) To except to rulings by the court made during the progress of the trial, and present the exceptions in a bill of exceptions.

- (b) To file special findings.

If there is a compliance with the procedure above set forth, the appellate court will review:

- (1) The rulings of the court made during the progress of the trial; and

- (2) The sufficiency of the facts found to support the judgment.

SECTION 6.

THE TERMS OF SECTIONS 649 AND 700, R. S., MUST BE CONFORMED WITH IN A REASONABLY STRICT FASHION.

The rule of compliance with the sections was laid down in the case of *Flanders v. Tweed*, 9 Wall. (U. S.) 425, at page 429, in the following words:

“ * * * if we (the Supreme Court) may expect to avoid like difficulties and disorder under the Act of 1865 (we shall have) to require, in all cases where the parties see fit to avail themselves of the privileges of the Act, a reasonably strict conformity to its regulations.”
(Matter in parentheses ours.)

SECTION 7.

THE PROVISION OF THE ACT OF MARCH 3, 1865 (649, 700 R. S.), REQUIRING THAT A STIPULATION IN WRITING AND FILED WITH THE CLERK, WAIVING A JURY TRIAL, MUST BE COMPLIED WITH IF THE SCOPE OF REVIEW OF THE CIRCUIT COURT OF APPEALS IS TO BE ENLARGED.

In this court, in 1909, the proposition of this section was determined in *Erkels v. United States*, 169 Fed. 623, where the court states, at page 624:

“This case comes here upon writ of error to review a judgment rendered in an action of ejectment brought by the plaintiff in error against the defendant in error after a trial without a jury in the Court below; there having been no written stipulation waiving a jury trial. The assignments of error raise the question of the sufficiency of the evidence to sustain the findings on which the judgment was based. * * *

Under that statute (Sect. 649, 700) it has been uniformly held that if a case is tried before the court without a jury and there is no written stipulation waiving a jury, none of the questions decided at the trial can be re-examined in an appellate court on writs of error."

The Erkels case does not present the exact situation found in the case before the court. In that case the statute was not complied with in that there was no written stipulation waiving a jury. In this case the statute has been complied with in that respect, but not in respect to the second provision stating the procedure whereby questions of law can be brought before the Circuit Court of Appeals for review. There has been no exceptions made to the court's rulings during the progress of the trial, and no exception so made, presented by a bill of exceptions; and there are no special findings of fact filed.

The Erkels case is valuable here to show that the procedure to enlarge the scope of review of the Circuit Court of Appeals set forth by Sections 649, 700, R. S., must be complied with. If it is not, no error of the trial court can be reviewed.

Perego v. Dodge, 163 U. S. 160;

Beuttel v. Magone, 157 U. S. 154;

Kearney v. Case, 12 Wall. (U. S.) 275.

SECTION 8.

THE PROVISIONS OF THE ACT OF MARCH 3, 1865, REQUIRING THAT EXCEPTIONS TO RULINGS OF THE COURT DURING THE PROGRESS OF THE TRIAL BE DULY PRESENTED BY A BILL OF EXCEPTIONS, AND SPECIAL FINDINGS BE FILED, MUST BE COMPLIED WITH IN ORDER TO ENLARGE THE SCOPE OF REVIEW OF THE CIRCUIT COURT OF APPEALS TO RULINGS MADE BY THE TRIAL COURT AND SUFFICIENCY OF THE FACTS FOUND.

The situation contemplated by the proposition states the situation found in the case. There was a stipulation in writing filed with the clerk (Transcript, page 195). There are no exceptions to rulings presented by the bill of exceptions (Transcript, pages 206 to 223, inc.). There is no finding of fact.

In discussing the proposition of this section it is necessary to inquire:

(a) The scope of review when there are no rulings duly excepted to and presented by bill of exception, and there are no findings.

(b) The dependence of scope of review upon the presence or absence of exception to the rulings of the court duly presented by a bill of exception and of general findings and special findings.

(c) If there are any substitutes for a special finding.

A. When a stipulation waiving a jury trial has been filed, but no exceptions to the rulings of the court have been made and duly presented by a bill of exception, and no findings have been filed, there has been no compliance with the Sections 649, 700, Re-

vised Statutes, and the scope of review of the Circuit Court of Appeals is limited to two questions: the jurisdiction of the trial court, and the sufficiency of the complaint.

Chief Justice Fuller, in considering such a situation, renders the following opinion in *Lloyd v. McWilliams*, 137 U. S. 576:

“In this cause trial by jury was waived by agreement of the parties in writing, duly filed, and the case was tried by the Court. But the record discloses no findings upon the facts, either general or special in accordance with the statute (Rev. Stat. Sec. 649, 700), and no questions are therefore open to our revision as an appellate tribunal.

As the Circuit Court had jurisdiction of the subject matter and the parties, its judgment must be presumed to be right and on that ground affirmed.”

B. The dependence of the scope of review of the Circuit Court of Appeals upon the presence or absence of the certain provisions of Sections 649, 700, Revised Statutes, namely, exceptions to rulings made by the court during the progress of the trial, and duly presented by a bill of exceptions, general findings and special findings.

By the case of *Norris v. Jackson*, 9 Wall. (U. S.) 125, findings of a cause tried by the court without the intervention of a jury, in compliance with Sections 649, 700, Revised Statutes, are given the same effect as a verdict by a jury. The court says:

“Whether the findings be general or special, the statute gives it the same effect as the verdict

of the jury, that is to say, it is conclusive as to the facts so found.”

And in that case the following legal situations were found to result from the presence or absence of exceptions and findings as required by the statutes. The court states the effect on page 129 as follows:

“1. If the verdict be a general verdict, only such rulings of the court, in the progress of the trial, can be reviewed as are presented by bill of exceptions, or as may arise on the pleadings.

2. In such cases, a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury.

3. That if the parties desire a review of the law involved in the case, they must either get the court to find a special verdict, which raises the legal propositions, or they must present to the court their propositions of law, and require the court to rule on them.

4. That objection to the admission or exclusion of evidence, or to such ruling on the propositions of law as the party may ask, must appear by bill of exceptions.”

This case has been repeatedly followed.

See

Kentucky Life and Acc. Ins. Co. v. Hamilton,
63 Fed. 97.

From the extract from *Norris v. Jackson*, *supra*, it can be fairly concluded that:

(1) If there has been a stipulation in writing waiving a jury trial, a general finding, and no exceptions to the rulings of the court, the Circuit Court of Appeals can review no questions of fact or

law. (See excerpt *Norris v. Jackson*, heading 1, *supra*.)

(2) If there has been a stipulation in writing waiving a jury trial, a general finding and certain exceptions to rulings of the court presented by a bill of exceptions, the Circuit Court of Appeals cannot review questions of fact, but can review the rulings of the court (see excerpt, *Norris v. Jackson*, *supra*, heading 1).

(3) If there has been a stipulation in writing waiving a jury, special findings, but no exceptions to rulings of the court, presented by a bill of exceptions, the Circuit Court of Appeals can review questions of law raised by the special verdict, but no other questions of law (see excerpt, *Norris v. Jackson*, *supra*, heading 2).

Note.—The court points out an alternative method of presenting questions of law, to wit, present the proposition and have the court rule on them.

(4) If there has been a written stipulation in writing, waiving a trial by jury, special findings, and exception to rulings by the court, duly presented by a bill of exceptions, the scope of review of the Circuit Court of Appeals extends to all questions of law arising upon the trial of the case, including the sufficiency of the facts to sustain the judgment, but to no question of fact (see excerpt *Norris v. Jackson*, *supra*, headings 3 and 4).

In the case before the court, it is to be noted that there is a bill of exceptions (Transcript, pages 206

to 223, inc.), which contains the whole of the testimony in this case. It is an obvious endeavor to present the testimony to the appellate court. This cannot be done, as can be seen by heading 2 of the excerpt from *Norris v. Jackson*, *supra*, which states:

“In such cases, a bill of exception cannot be used to bring up the whole testimony for review, any more than in a trial by jury.”

Also the writer desires to call to the court's attention that the phrase “rulings of the court in the progress of the trial” does not include the general finding of the court, nor the conclusion embodied in the general finding.

Cooper v. Omohundro, 19 Wall. (U. S.) 65.

C. A consideration of the question whether or not a substitute can be found for the “special finding of fact” required in Sections 649, 700, Revised Statutes, to enlarge the scope of review of the Circuit Court of Appeals.

At this time it is necessary to point out that there need be no further discussion of “rulings made in the course of trial” and “general findings.” An investigation of the bill of exceptions (Transcript, pages 206 to 223) discloses no exception. The law is that a general finding concludes both questions of law and fact even as a general verdict (*Norris v. Jackson*, *supra*).

The only way that the plaintiff in error can present questions for the review of the Circuit Court

of Appeals is by presenting in a bill of exceptions, special findings or a substitute therefor.

There is no question but that special findings as such have never been filed. However, the decisions disclose attempts which have been made to discover a substitute for that requirement in (1) agreed statements of fact; (2) opinion of the court.

(1) When can an agreed statement of facts stipulated to by the parties to the writ of error be substituted for a special finding?

In the case of *Wayne County v. Kennicott*, 103 U. S. 554, where there was an agreed statement of facts, the court states:

“As to the finding. Even before the Act of 1865, 13 Stat. at L. ch. 86, Sec. 4, reproduced in Secs. 649 and 700, Rev. Stat., it was always held that a judgment on agreed facts spread at large on the record could be reviewed here on a writ of error. * * *

It is manifest that the Act of 1865 was not intended to interfere with this practice.”

A declaration of what is and what is not an agreed statement of facts suitable to perform the functions of a special finding is found in the case of *Wilson v. Merchants Loan & T. Co.*, 183 U. S. 121, at page 126, where the court states:

“The result of the decisions under the statutes providing for a waiver of trial by jury, and the proceedings on a trial by the court (Rev. Stat., secs. 649, 700), is that when there are special findings *they must be findings of what are termed ultimate facts, and not the evidence from which such facts might be but are not found. If,*

therefore, an agreed statement contains certain facts of that nature, and in addition thereto and as part of such statement there are other facts of an evidential character only, from which a material ultimate fact might be inferred, but which is not agreed upon or found, we cannot find it, and we cannot decide the case on the ultimate facts agreed upon without reference to such other facts. In such case we must be limited to the general finding by the court. We are so limited because the agreed statement is not a compliance with the statute."

The case before the court contains a statement of facts (Transcript, pages 207 to 211), in which is included a statement of certain facts, and an agreed statement of what the testimony of *a certain witness would testify to if placed upon the stand*. His testimony bears upon material ultimate facts. It is a situation contemplated by the opinion above set forth. It is a case where "there are other facts of an evidential character only, from which a material ultimate fact might be inferred." Besides there is the oral testimony of the plaintiff upon certain material matter (Transcript, pages 212 to 213 inc.).

(2) When can the opinion of the trial court be substituted for a special finding of fact?

The defendant in error has been unable to discover any case in which a statement of facts, in an opinion, were viewed as a special finding of fact, except *Insurance Co. v. Tweed*, 7 Wall. (U. S.) 51. This case is fully discussed by Justice Lurton in *Kentucky L. & A. Co. v. Hamilton*, *supra*, in determining that in the case then before the court, there was no opinion

which could be substituted for a special finding of fact. On page 95, Justice Lurton states:

“That entry recites that, ‘the court delivered a written opinion,’ ‘and made a finding of all the issues in favor of the plaintiff.’ This is nothing more than a general finding in favor of the plaintiff. The contention of the appellant is that the effect of the recital is to make the opinion a part of the record, and a special finding of facts, within the statute. We do not think the opinion thereby becomes a part of the record. It is a mere recital of the fact that an opinion had been read. The opinion did not become thereby a part of the judgment entry, and did not operate as a special finding of facts. The opinion is included in the transcript sent to us, *but there is no minute entry making it a part of the record.* It was properly included in the transcript under the 14th rule of this court, which requires the clerk of the circuit court ‘to transmit with the record a copy of the opinion or opinions filed in the case.’ *This opinion does not purport to be a special finding of facts.* Some parts of the evidence are referred to and commented on for the purpose of supporting the judgment. In so far as it deals with the facts, it is a mere statement of the evidence, and not the conclusion of the court as to the facts from the evidence. In *Insurance Co. v. Tweed* a like question arose. Mr. Justice Miller, on this subject, said:

‘We are asked, in the present case, to accept the opinion of the court below, as a sufficient finding of the facts, within the statute, and within the general rule on this subject. *But, with no aid outside the record, we cannot do this.* The opinion only recites some parts of the testimony by way of comment in support of the judgment, and is liable to the objection, often referred to in this court, that it states the evi-

dence, and not the facts as found from that evidence. *Besides, it does not profess to be a statement of facts, but is very correctly called in the transcript, "reasons for judgment" (7 Wall. 51).*

In that case, counsel stipulated in the supreme court that certain parts of the opinion should be accepted as showing the material facts of the case. Upon this agreement the court permitted the opinion to stand for a special finding of facts. *Whether that practice would be again followed is more than questionable.* Here there is no such agreement. Upon the contrary, counsel for appellee has strenuously insisted in brief and argument that no case is here presented for review by this court, and that the opinion is not a special finding of the ultimate facts. We have, therefore, 'no aid outside of the record,' and we cannot treat the opinion as a finding of facts. *Insurance Co. v. Tweed, supra; Dickinson v. Bank, 16 Wall. 250; Reed v. Stapp, 3 C. C. A. 244, 52 Fed. 641."*

And in *Dickinson v. Planters Bank, 16 Wall. (U. S.) 250*, the court in this reference states:

"Some facts indeed are stated in the opinion of the court that seem to have accompanied the judgment, *but they are not stated as a special finding. They are rather advanced as reasons why the judge came to the conclusion. * * ** It is impossible anything that appears in this case as a special verdict."

In *Hinkley v. City of Arkansas City, 69 Fed. 768*, at page 771, the rule is laid down:

"It (a special finding of fact) must not be a mere recital of the testimony on which the ultimate finding is to be based, nor *leave a part of the material issues of fact raised by the plead-*

ings undecided. Moreover, a special finding should be so framed as to indicate clearly that the trial court intended it not merely as an opinion containing a decision of law and fact, but as a special finding embodying his ultimate conclusion on mooted questions of fact only."

In our case the opinion can not be considered as an "agreed statement of fact" or a "special finding" because

(a) There is no minute order making it part of the record.

(b) The opinion does not purport to be a special finding of fact. There is nothing to show that the court considered its statement as complete, or anything more than its reasons for decision. There is nothing to show that the court intended its opinion as a special finding.

(c) There has been no agreement by the defendant in error that the opinion be considered as an "agreed statement of fact" or a "special finding". The court, it is to be noted, states that even if there had been an agreement by the parties in *Kentucky Life & Acc. Ins. Co. v. Hamilton* to consider the opinion as a special finding, nevertheless, "whether that practice would be again followed is more than questionable."

SECTION 9.

WHEN THE PROVISIONS OF THE ACT OF MARCH 3, 1865, (SECTIONS 649, 700, R. S.) ARE NOT COMPLIED WITH THE SCOPE OF REVIEW BY THE CIRCUIT COURT OF APPEALS IS THE SAME AS PRIOR TO THE ENACTMENT, TO WIT: JURISDICTION OF THE TRIAL COURT, AND THE SUFFICIENCY OF THE COMPLAINT.

When there has been no compliance with the Statute, Sections 649 and 700, Revised Statutes, the position of the parties upon writ of error is the same as a trial by court before the Act of 1865. *Kearney v. Case*, 12 Wall. (U. S.) 275, states the law:

“We cannot believe that Congress intended to say that the parties shall not as heretofore submit their cases to the court unless they do so by a written stipulation, but that it was the intention to enact that if parties who consent to waive a jury desire to secure the right to a review in the Supreme Court of any question of law arising in the trial, they must first file their written stipulation, and must then ask the court to make a finding of such facts as they deem essential to the review and ask the ruling of the court on points to which they wish to except. *If this is not done the parties consenting to waive a jury stand as they did before the statute, concluded by the judgment of the court on all matters submitted to it.* This we understand to be the effect of the opinion in *Flanders v. Tweed*.”

The situation in the case at bar is, then, that which is set forth in the case of *Lloyd v. McWilliams*, supra, and Section 8, which discusses the error reviewable by the appellate court before the Act of 1865.

Under such circumstances only the sufficiency of the complaint and the jurisdiction of the trial court will be reviewed by the appellate court on writ of error.

Lehnen v. Dickson, 148 U. S. 71, states the rule:

“There is no special finding of facts and no agreed statement of facts. Obviously, therefore, inquiry in this court must be limited to the sufficiency of the complaint and rulings, if any be preserved, on questions of law arising during trial.”

See also:

City of St. Louis v. Western Union T. Co.,
166 U. S. 388.

SECTION 10.

THE TRIAL COURT HAD JURISDICTION OVER THE PARTIES AND SUBJECT-MATTER.

There were three parties to this cause in the trial court, namely, Mrs. Dunlevy, defendant in error as plaintiff, New York Life Insurance Company and Gould, present plaintiffs in error, and defendants in the trial court. The first defendant, New York Life Insurance Company, appeared, and the other was served, within the State of California (Transcript, page 24) before the cause was removed to the federal court (Transcript, pages 10 and 11). The property involved was a debt owing from the New York Life Insurance Company to either Mrs. Dunlevy or Gould. The *res* in debt must have been within the jurisdiction of the State of California

as the debtor, New York Life Insurance Company and the creditor, either Mrs. Dunlevy or Gould, were present within the state and within the jurisdiction by appearance or by the service of process. The sum involved and diversity of citizenship necessary for jurisdiction by the federal court, appears in the petition for removal of the cause from the state court (Transcript, pages 6 to 10 inc.).

SECTION 11.

THE COMPLAINT ON FILE IN THIS ACTION IS SUFFICIENT TO SUSTAIN A JUDGMENT IN FAVOR OF THE DEFENDANT IN ERROR, THE PLAINTIFF IN THE TRIAL COURT.

The only question presented by the proposition above is, Does the complaint state a cause of action? If it does, it is sufficient to sustain a judgment.

The complaint is composed of eight allegations which state: In allegation 1, the corporate existence of the New York Life Insurance Co. under the laws of the State of New York, the fact that it is doing business in the State of California, and its designated agent within the State of California; in allegation 2, that defendant Joseph W. Gould is plaintiff's father; in allegation 3, that New York Life Insurance Co. issued a policy of insurance on the life of Gould, which provided for a cash surrender at the end of 20 years; that Gould performed all of the provisions of the policy by him to be performed, and that there was due from the New York Life Insurance Co. on January 22, 1909, the sum of

\$2479.70; in allegation 4 that Gould executed an assignment of all benefits of the policy to the plaintiff, for value, that his daughter was named as assignee in the instrument and was at that time 13 years of age; that said assignment was acknowledged and delivered to the New York Life Insurance Co.; that the insurance company had retained a duplicate of the assignment; in allegation 5, that the assignee, Effie J. Gould, is the plaintiff herein; in allegation 6, that the sums due have not been paid; in allegation 7, that the policy and the duplicate of the assignment are in Gould's hands; in allegation 8, that both defendants are residents of California.

From the statement given above, and from the fact that it was the only point made on demurrer, the defendant in error apprehends that the one question which will be raised as to the sufficiency of the complaint to sustain the judgment will be that of delivery. There is an allegation that there was a delivery to the New York Life Insurance Co., but none to the defendant in error, Effie J. Gould Dunlevy. Also there is no allegation that the assignee was or was not notified of the assignment or whether or not she had any knowledge thereof.

In the consideration of this question the writer of this brief desires to call the court's attention particularly to the relationship of the assignor and the assignee, and also to the age of the assignee. Gould, the assignor, was the father of the assignee,

Mrs. Dunlevy, and at the time of the assignment, the assignee was but 13 years of age.

The decisions upon the question of delivery of an assignment are uniform in the statement that there need be no delivery if the intent of the assignor was to divest himself of title.

McDonough v. Aetna Life Ins. Co. 78 N. Y. S. 217;

Hurlbutt v. Hurlbutt, 1 N. Y. S. 854;

Burges v. New York Life Ins. Co., 53 S. W. (Tex.) 602;

Northwestern Mutual Life Ins. Co. v. Wright, 140 N. W. (Wis.) 1078;

New York Life Ins. Co. v. Flack, 3 Md. 341;

Appeal of Coburn, 74 Conn. 463;

Weaver v. Weaver, 55 N. E. (Ill.) 338.

The decisions are based upon two theories, one, that by conduct and declarations exhibiting intention the assignor has constituted some third person or himself trustee for the benefit of the assignee; and secondly, that as a principle in the law of gifts, it is unnecessary that the assignor actually deliver the executed assignment, if from his acts and declarations an intention is manifest to make the gift.

(a) When an assignor, by his acts and declarations, exhibits intention to make a gift there need not be a delivery of the executed assignment to the assignee, inasmuch as by these acts and declarations the assignor has constituted some third person or himself as trustee for the assignee.

In the case of *Martin v. Funk*, 75 N. Y. 134, the court considers the question in these words, at page 137:

137. "The act constituting the transfer must be consummated, and not remain incomplete or rest in mere intention, and this is the rule whether the gift is by delivery only, or by the creation of a trust in a third person or in creating the donor himself a trustee. Enough must be done to pass the title although when a trust is declared, whether in a third person or the donor, it is not essential that the property be actually possessed by the cestui que trust, nor is it even essential that the latter should be informed of the trust. In *Milroy v. Lord*, (4 De Gex F. & J. 264) Lord Chief Justice Turner, who adopted the most rigid construction of trusts in delivering an opinion against the validity of the trust, in that case laid down the general principles as accurately perhaps as is practicable. He said: 'I take the law of this court to be well settled that in order to render a voluntary settlement valid and effectual the settler must have done everything which according to the nature of the property comprised in the settlement was necessary to be done in order to transfer the property and render the settlement binding on him. He may of course do this by actually transferring the property to the persons for whom he intended to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declare that he holds it in trust for those purposes and if the property be personal, the trust may, I apprehend, be declared either in writing or by parol.' "

Where the insured assigned his policy to a third person for his wife's benefit, and the third person

being notified, agreed to the trust, but the executed assignment was never delivered, it was held that the wife was entitled to the benefits of the policy.

New York Life Ins. Co. v. Flack, 3 Md. 341.

Where a trustee, having converted certain funds of his *cestui que trust* to his own use, took out a policy of insurance upon his own life, endorsed upon it an assignment to the *cestui que trust*, and placed it in an envelope in his safe, with a note to his executor stating he had assigned the policy to the *cestui que trust* to pay off the obligation so incurred, and the policy and note were found in the safe after the death of the trustee, it was held that the circumstances constituted a valid assignment of the policy to the *cestui que trust* to secure the payment of the obligation from the trustee. The circumstances were such as to constitute a valid trust. No delivery was necessary.

Hewitt v. Provident Life & Trust Co.,
10 Ohio Dec. 53.

Where an intestate deposited money in a bank, declaring she desired the account in trust for one, a distant relative, and retained possession of the pass book until her death, and the beneficiary was ignorant of the deposit until after her death, the court held there was trust created and the beneficiary was entitled to the deposit.

Martin v. Funk, *supra*.

The court in this case discusses the question of creation of a trust and notice thereof to the beneficiary in the following language:

Page 143. "As notice to the cestui que trust was not necessary, and as the retention of the pass book was not inconsistent with the completeness of the act the case is peculiarly one to be determined by the test: did the intestate constitute herself a trustee. After a careful consideration of the case in connection with the established rules applicable to the subject and authorities, I think this question must be answered in the affirmative. It was not done in express formal terms but such is the fair legal import of the transaction. * * * It is sufficient to say that there is no finding of an intent contrary to the creation of a trust, and the facts found do not establish such an adverse intent."

See also:

Otis v. Beckwith, 49 Ill. 121.

(b) It is a principle of the law of gifts that no delivery of an assignment is necessary to complete the same, if the conduct and declarations of the donor exhibit an intention to divest himself of title.

In the case of McDonough v. Aetna Life Ins. Co., *supra*, a question similar to the one before the court was presented. The insured made out duplicate assignments; sent the duplicate assignments to the insurance company, which retained one and returned the other to the insured. There was no delivery of the assignment to the

named assignee. In determining that the assignment was complete without manual delivery of the instrument, the court says:

*“If any presumption is to be indulged in as to how they (the assignments) came into the hands of the company it would be natural to say the assignee sent them. If the assignor, the insured, sent them, then the presumption would be that he sent them for the benefit of the assignee. * * ** The possession of the assignments by the defendant was in effect the possession by the assignee and is prima facie evidence of delivery” (parentheses ours).

In the case of *Hurlbutt v. Hurlbutt*, 1 N. Y. S. 854, the insured made out duplicate assignments, naming his daughter as the assignee, and mailed them to the insurance company. The company retained one of the duplicates and returned the other to the insured. He did not deliver it to the assignee. The court viewed the delivery of the assignment to the insurance company as a delivery to the daughter, stating, at page 855:

“But it is not necessary that the delivery of the thing intended to be given should be made directly to the person intended to receive the gift, but it may be made to another person for him or her when that is done so as to divest the possession and title of the donor.”

Young v. Young, 80 N. Y. 422, 430.

See also:

Reid v. McCrum, 91 N. Y. 412, 419.

The case of *Burges v. New York Life Ins. Co.* (supra) presents the following facts: The insured

sent duplicate assignments to the company, naming his adopted daughter as the assignee. No delivery was ever made to the daughter. The court's opinion is that (page 605):

“We are of the opinion that mailing of the assignment in duplicate to the insurance company at its home office, in compliance with the provisions of the insurance contract as to assignment thereof was in law a sufficient delivery. This act upon the part of the assignor evidenced his intention to consummate the transaction by a delivery and that, too, in the manner provided by the policy. *Further as to this question of delivery, it must be remembered that assignee was the adopted child of the assignor, of tender years, dependent, we are warranted in presuming, upon him for support and protection; and that he as her natural guardian and protector was the proper custodian of her property.* * * *”

The latest decision on this subject is *Northwestern Mutual Life Ins. Co. v. Wright*, supra, decided in 1913. The facts disclose that the assignees were the mother and sister of the assignor; that duplicate assignments were sent to the insurance company, and that there was no evidence of notice or knowledge of the gift on the part of the assignees. The court holds that (at page 1080):

“No particular act on the part of the vendee or assignee is necessary to complete the mutual-ity disabling the vendor or assignor from recalling the title he intends to part with. The instrument of transfer may be delivered to a third person with intention not to recall it and the transaction be complete, *even as indicated, without the new owner having present*

knowledge thereof. The delivery to the third person and acceptance by him for the purposes of the transaction is delivery to the new owner—where such a transaction is beneficial to the new owner the law supplies the rest. *Acceptance by the new owner is presumed until the contrary is shown*—thus ending the dominion of the old owner and initiating that of the new” (citing numerous authorities).

And (at page 1081):

“On the whole case it seems quite clear that the delivery of one of the duplicate originals of the assignment to the insurance company was a good surrender of dominion over the policy to a third party for the benefit of the assignees.”

The case of Appeal of Colburn (*supra*) in general presenting the essential facts in the case at bar, discusses the necessity of delivery in the following language (page 140):

“But a delivery of the obligation itself is not indispensable. When an obligation for the payment of money is absolute, although the time of payment has not arrived, the fund may be assigned notwithstanding the document creating or evidencing the duty to pay it be retained in the hands of the assignor.”

In the case of *Abegg v. Hirst*, 122 N. W. 838 (Ia.), one Hirst purchased a mortgage, and had the note, and mortgage assigned to himself and wife. The note and mortgages were retained by Hirst until his death. There was no evidence that his wife had any knowledge of the assignment. The question presented by the case was: Did the facts

show a gift of one-half interest of the note and mortgage to the wife? That eminent writer on insurance law, Chief Justice McClain, in determining that the facts did show a gift to the wife, states the law to be:

“Had the assignment been to the wife accompanied by delivery to a trustee to hold for the wife until her husband’s death, collecting the interest in the meantime for the benefit of William Hirst, there would have been no doubt as to the complete consummation of the gift, for knowledge of such a gift purely beneficial need not be shown to have been brought home to the donee during the lifetime of the donor * * * and the donor may have himself constituted trustee of the property for the donee.

The general rule announced by the cases is that where something remains to be done in carrying out the donor’s intent no matter how unequivocal the intent itself may be, the gift is not complete. * * * But here nothing remained for him to do. * * * *His possession thereof was not in any way inconsistent with the complete vesting of title to one-half interest in his wife for delivery to either one was a complete execution of such assignment.*”

In the case of *Weaver v. Weaver*, supra, which decided that the facts did not show an intention to make a gift, the principle is recognized in these words:

“No controversy is made upon the proposition that an actual manual delivery is not necessary. * * * But it is too well understood to call for the citation of authorities that the declarations and conduct of the grantor in relation to the instrument may be

such as to become equivalent to such actual delivery, and in each case the crucial test is the intent with which the acts or declarations were made, and that intent is to be ascertained from the conduct of the parties, particularly the grantor, and all the surrounding circumstances of the transaction.”

The court then distinguishes the case of Hurlbutt v. Hurlbutt, *supra*, on the facts, stating:

“It was perfectly consistent with all the facts in that case to hold that the delivery to the agency of the company was with the intent to divest the title of the father and transfer it to the daughter.”

See also:

Chamberlin v. Williams, 62 Ill. App. 423.

One of the duplicate assignments was retained by the company (Transcript, page 208). Both duplicate assignments are originals.

Northwestern Mutual Life Ins. Co. v. Wright, *supra*.

In the complaint before the court, the situation discloses that there was no delivery to the assignee, but there was to the insurance company. With what intention did the assignor deliver the duplicate assignments to the insurance company? What do his declarations and conduct as set forth in the complaint exhibit concerning his state of mind? Gould’s written instrument shows an absolute intention to “assign and transfer unto Effie J. Gould—the policy—and all dividend, benefit and

advantage to be had or derived therefrom". The instrument, as far as the complaint shows, was delivered to the insurance company with no conditions or limitations. By his declarations and conduct with the insurance company, he named his daughter the owner of the policy. The presumption to be indulged in by these acts is that the delivery was for the benefit of the assignee and the possession of the insurance company is in effect the possession of the assignee and is *prima facie* evidence of delivery (*McDonough v. Aetna Life Ins. Co.*, *supra*). A delivery of an assignment may be made, not to the assignee, but to a third person, i. e., insurance company (*Hurlbutt v. Hurlbutt*, *supra*). To go a step farther—the assignor received the duplicate assignment returned by the insurance company. He retained the same in his possession. The assignee was his daughter and but 13 years of age. Inasmuch as she was a child of tender years, dependent upon her father for support and protection, and he was her natural guardian and protector, he was the proper custodian of her property (*Burges v. New York Life Ins. Co.*, *supra*). Since there is no allegation that the assignee did or did not have knowledge of the assignment and the transaction is beneficial to her, she is deemed to have had notice and have accepted the same (*Northwestern Mutual Life Ins. Co. v. Wright*, *supra*). Here there was nothing for Gould to do. He could not give the assignment to his daughter, a child of tender years. Retention thereof was not in any way inconsistent

with his vesting title in the child (*Abegg v. Hirst, supra*).

Moreover, it is perfectly consistent with all of the facts in this complaint to hold that the delivery to the agency of the company was with the intent to divest the title of the father and transfer it to the daughter (*Weaver v. Weaver, supra*).

The conclusion therefore from the cases cited must be, that there was a good assignment, that the complaint is sufficient and that therefore the judgment must be affirmed.

SECTION 12.

CONCLUSION OF TOPIC I, WITH REFERENCE TO THE ASSIGNMENT OF ERRORS.

An examination of the assignment of errors discloses that a large number thereof refer to errors made by the trial court in determining the cause in favor of the defendant in error. Errors numbered II, IV, V, VI, VII, VIII, XI, XII, and XIII state in different form an error of the District Court in rendering judgment in favor of Mrs. Dunlevy and against the New York Life Insurance Company. By Topic I it has been shown that the Circuit Court of Appeals cannot consider whether or not the trial court did make these errors or any of them. The plaintiff in error failing to comply with the conditions imposed by Sections 649 and 700, Revised Statutes, limited the scope of review to the jurisdiction of the court and the sufficiency of the complaint.

Errors numbered III and X refer to the jurisdiction of the court. It has been conclusively shown that the court had jurisdiction. Consequently, the trial court did not so err.

Errors numbered IX and XIV present the question of the sufficiency of the complaint. It has been shown that the complaint was sufficient. Consequently the trial court did not so err.

Topic II.

Assuming that Sections 649, 700, Revised Statutes, have been complied with, and that any and all questions which could arise on the trial of this cause are properly before this court for review, still the judgment must be affirmed.

SECTION 13.

STATEMENT OF FACTS.

The plaintiff in error in 1889 issued a policy of insurance upon the life of Joseph W. Gould. By the terms of the policy the plaintiff in error agreed to pay a certain sum of money to the insured at the end of a 20-year tontine period. Four years later, in 1893, the assured assigned the policy and all benefits to be derived therefrom to his daughter, then 13 years of age. The assignment was made out in duplicate and both the duplicate copies sent to the insurance company.

The company retained one and returned the other to Gould. There is no evidence that Gould ever delivered the assignment to his daughter, or notified her thereof. The tontine period has passed and Mrs. Dunlevy is suing for the tontine benefits.

The action was commenced in the California State court, and removed to the federal court on the ground of diversity of citizenship. The answer of the plaintiff in error sets up a judgment rendered in the State of Pennsylvania which determined that there was no assignment of the policy by the acts set out above and that Gould was the owner thereof. This judgment it is stipulated is a true and correct copy of the judgment rendered in Pennsylvania.

SECTION 14.

AN OUTLINE OF POINTS TO BE MADE BY THE DEFENDANT IN ERROR, WITH A VIEW OF REBUTTING TOPIC A OF PLAINTIFF IN ERROR'S BRIEF.

A statement of points made by the plaintiff in error's brief upon the proposition that defendant in error had no right to the tontine benefits arising under the policy.

(1) There was no delivery of the assignment; that delivery thereof to the insurance company did not constitute a sufficient delivery of that possession; that the possession of the assignment by Gould is not the possession of his daughter.

(2) That assuming a delivery of the duplicate assignment to the insurance company, or possession thereof by Gould constituted a delivery, yet the delivery was conditional; it was to take effect upon Gould's death.

(3) Gould did not have an intention to make a gift of the tontine benefits; Gould's evidence in this regard is uncontradicted: and if contradicted is competent to vary the terms of a written instrument.

With the preceding points in mind, the defendant in error maintains:

1. That Gould intended to make a gift of the tontine benefits (Section 15).

A. That the uncontroverted evidence shows an intention to give all the benefits of the policy (Section 16).

a. The executed assignment is the only evidence of the intention (Section 17).

b. Parol evidence of intention is inadmissible (Section 18).

c. The facts in this case do not present an exception to the parol evidence rule (Section 19).

B. Admitting the evidence contended for by the plaintiff in error, still it is of lesser weight than that adduced by the defendant in error (Section 20).

2. The evidence shows an intention to make an unconditional delivery of the assignment (Section 21).

3. That there was a legal delivery of the assignment (Section 22).

NOTE: The defendant in error has inverted the order of the points made by the plaintiff in error.

SECTION 15.

GOULD INTENDED TO MAKE A GIFT OF THE TONTINE BENEFITS.

The defendant in error offers two propositions:

That the evidence shows an *intention to give the tontine* as well as the *life benefits*; that this evidence is uncontroverted, and the parol evidence referred to by the defendant is not admissible; that, assuming the parol evidence referred to by the defendant is admissible, still it is of less weight than that adduced by the plaintiff.

Before commencing a discussion of the proposition set forth above, the writer would state that according to his understanding the parol evidence which is in question has been admitted and considered by the court in rendering its judgment; that the parol evidence has been found wanting in weight. The basis of this statement is particularly the following line of the decision of the trial court: "This evidence (referring to Gould's declarations) is not sufficient to defeat the plaintiff's title." (Dunlevy v. New York Life Insurance Company, 204 Fed. 672.) If this is a correct interpretation of the language used, a review by the Circuit Court of Appeals on the grounds of admissi-

bility of Gould's declaration is based on a contention, already admitted by the trial court, and' is therefore of no avail, and the plaintiff in error is in the position of asking for something it already has. However, recognizing that the writer's interpretation may be incorrect, or that the court considered the same, though inadmissible, in order to give the plaintiff in error's case the widest latitude possible, this brief will deal with the question of admissibility, as well as the weight of the parol evidence.

SECTION 16.

THE UNCONTROVERTED EVIDENCE SHOWS AN INTENTION BY GOULD TO GIVE ALL THE BENEFITS OF THE POLICY TO HIS DAUGHTER, THE PLAINTIFF.

In discussing this general proposition, the writer intends: First, to show that the written assignment constitutes the sole evidence on this question; that the stipulation discloses no declarations by Gould at the time of the gift which can be considered as declarations evidencing intention; that the stipulation discloses a declaration made by Gould in 1913, which is inadmissible on the ground of remoteness;

Secondly: That, assuming that declarations were made at the time of gift, these declarations are inadmissible on the ground that parol evidence cannot be introduced to contradict or vary a term of writing; that this written assignment is such a

writing, that the donor's expressed intention is a term; and that the parol evidence does vary the expressed intention.

SECTION 17.

THE EXECUTED ASSIGNMENT IS THE ONLY EVIDENCE OF THE DONOR'S INTENTION TO GIVE.

The sole evidence as to Gould's mental state at the time of making the assignment is the document itself, executed June 27th, 1893. In that document is found this language:

"For value received, I hereby assign and transfer to Effie J. Gould * * * the policy of insurance * * * issued by the New York Life Insurance Company upon the life of Joseph W. Gould * * * and *all* the dividend, benefit and advantage to be had or derived therefrom * * *."

(Transcript, pages 207 and 101.)

The language is absolute and unconditional, and constitutes the *sole* and *only* evidence in the case on the question of intention to give.

The only other place where evidence upon this matter could possibly be found is the Stipulation of Facts (Transcript, page 210). It is there agreed what Gould's evidence would be if he were placed on the witness stand. The stipulation does not, as perhaps will be contended by the plaintiff in error, state the facts, but only Gould's mental state—his intention, or lack of intention, to give, from his evidence as agreed upon, and has relied upon one excerpt which is as follows:

“I (Gould) signed the same on the said L. H. McCreary’s assertion that it was an assignment to my said daughter of the said policy, only on condition that I should die before the maturity of said policy, or before all the premiums were paid thereon * * *. I had no intention of making an absolute assignment of said policy to my said daughter, or to any other person.”

Where is a statement of Gould’s declaration in that excerpt? There is evidence of a certain *McCreary’s* assertion—but there is no evidence of *Gould’s* declaration! There are declarations by McCreary evidenced and there is a direct statement by Gould as to his intention, the latter a declaration made in 1913, in a stipulation, and not in 1893. There is *no evidence* as to Gould’s declaration at or about the time of making the gift. The written assignment is the sole contemporaneous evidence. These declarations made in a stipulation in 1913 are inadmissible on the ground of remoteness.

(Ware v. Edge, 100 Ky. 757.)

SECTION 18.

PAROL EVIDENCE OF THE DONOR’S INTENTION IS INADMISSIBLE AS IT VARIES AND CONTRADICTS THE INTENTION EXPRESSED IN THE WRITTEN ASSIGNMENT.

Let us assume for the time being there were declarations made by Gould at the time of giving, and that these declarations evidenced a lack of intention. Still the evidence is parol and is inad-

missible because it varies and contradicts a writing.

The general rule as to the non-admissibility of parol evidence is found in 17 Cyc. 567, where the statement is made:

“The general rule is that when any judgment of any court, or any other judicial or official proceeding, or any grant or other disposition of property, or any contract, agreement, or undertaking has been reduced to writing, and is evidenced by a document, or series of documents, the contents of such documents can not be contradicted, altered, added to or varied by parol or extrinsic evidence.”

That a written assignment such as the one at bar presents a case where the parol evidence rule can be invoked is not to be doubted. The rule refers to varying or contradicting a *term* of a *writing*.

A written assignment is a writing under the parol evidence rule.

17 Cyc. 635 (and cases cited).

Since a written assignment comes within the rule, the further question arises, whether or not *intention* expressed in a writing is a *term*.

There is no question but the interpretation of the words “I hereby assign * * * all dividend, benefit and advantage * * *” must be that Gould intended to *give all* his interest in the policy. These words constitute the expression of what Gould had in his mind. They constitute the tangible consequences of his mental volition. As Wigmore states the rule:

“The act (his intent) as legally effective will be determined, in respect to the three elements of subject, terms and finality, by that *expression of it which results, to the other person in the transaction, as the consequence, reasonably to have been anticipated under the circumstances of the volition of the actor.*” (Wigmore on Evidence, 1905 ed., Section 2413.) (Parentheses ours.)

Gould is the actor. He created a document. The document contains an expression of Gould’s intention in the words “I assign * * * all.” Will it not be said that the subject of his act is “all” of the policy, and not a part? The insurance company may admit Gould had an intent to give, but not an intent to give all. “All” or “part” is the subject of his mental state. Can one *reasonably* understand but that everything of the policy was the subject when the reference is made to “all”? That this section in Wigmore’s Evidence refers to an *expression of intention* as a *term* within the parol evidence rule may be seen by a reference to the Indiana case cited by him, Indianapolis v. Kingsbury, 101 Ind. 201, 213, where the court says:

“We fully agree with the counsel for the appellees that an essential element of dedication is the *intent* of the owner *to dedicate* his land to a public purpose, and we unhesitatingly affirm that without such an intention it is impossible that there should be a valid dedication. *But the intention to which the courts give heed is not an intention hidden in the mind of the landowner, but an intention manifested by his acts.* It is the intention which finds expression in conduct and not that which

is secreted in the heart of the owner that the law regards. * * *”

As the expression of intention is a written instrument and Gould's oral expression which contradicts the written expression of intention, cannot be considered. Gould created an instrument. That instrument is the expression, the manifestation of his intention. The court must seek Gould's intention from the words “I assign * * * all * * * .”

It may be contended that Gould did not read the instrument. This does not change the situation. Wigmore on Evidence, Sec. 2415, states the rule:

“Where a legal act is executed by signing a specific and *complete* document, the second party has a right to treat the signed contents as representing the terms of the act. The principle of reasonable consequence plainly requires this result. That the signer did not intend to execute such terms is immaterial; and whether the lack of intent was due to a failure to read it over or some other cause is immaterial. In other words, his individual innocent mistake or deliberate secret dissent can not be shown. Such may be taken to be the general rule. * * *” (Cases cited.)

And then Wigmore gives an exception:

“Where a document was drafted and prepared by the second party.”

The New York Life Insurance Company, not Gould, prepared this document (Stipulation of Facts, Transcript, page 210). And the New York Life Insurance Company can not now defeat this action

by advancing an objection which would lie in favor of Gould in a controversy over the assignment between it and Gould. The fact that it prepared the document holds it to the contents thereof. It might be an argument for Gould to advance against the company, but certainly not for the company against the assignee.

SECTION 19.

THE FACTS IN THIS CASE DO NOT PRESENT AN EXCEPTION TO THE PAROL EVIDENCE RULE.

The writer has assumed so far that the facts of this case did not present an exception to the parol evidence rule. The plaintiff, however, may claim that the facts present an exception for (a) the insurance company is a stranger to this writing and the parol evidence rule cannot be invoked against strangers but against parties to a writing and their successors in interest, and (b) the parol evidence rule cannot be invoked in determining whether or not a gift of a chose in action was intended.

To take the first proposition—that the parol evidence rule cannot be invoked against strangers to a writing. The plaintiff agrees to that proposition of law. In our case, however, the New York Life Insurance Company is *not* a stranger to the instrument, but is a party thereto.

The written assignment has, under the facts of our case, a dual aspect. It was a document prepared by the insurance company and signed by the as-

signor in the presence of the company and then delivered to the company. It was not only a written assignment—a writing showing a transfer of rights by the assignor to the assignee—but it was also a notice to the obligor of a debt of a change in ownership. The assignment represents in one document the transfer of the assignor's chose in action, and by also being a notice, a change of the debtor's obligation, for, because of the notice, the obligation is thereafter owing to the assignee and not to the assignor. In other words there are three parties to the writing—the assignor, who transferred the chose in action; the assignee, who received the chose in action; and the debtor, who prepared the assignment and recognized a change in the ownership of its obligation by having the same signed and posted with it. The fact that the notice was prepared by the company makes out a strong reason why it cannot be varied by parol evidence (Wigmore on Evidence, Section 2415). The fact that it is a written notice, changing the company's legal relations as well as assignor's and assignee's, determines absolutely that it cannot be varied by parol.

There is still another way by which Gould was made a party to this writing. The notice was prepared by the company and constituted an engagement or offer by the company that it would assent to anything therein contained. The offer of the company is: "You sign and we will consider the document according to its purport." Inasmuch as it does on its face assign all the rights in the par-

ticular policy the engagement by the company is to view the plaintiff as the creditor of all the rights under the policy. In other words, the facts make out a contract entered into by the company and Gould, acting for and in behalf of the plaintiff, his then minor child, whereby the company undertook to pay the obligation to the plaintiff.

From another view point, the company is a party, not a stranger to the instrument. The company is advancing contentions which belong to Gould, and,

“Where a third person, not a party to an instrument, claims rights or benefits thereunder and seeks to take advantage thereof, the parol evidence rule applies to him as much as to a party, and he is not entitled to introduce evidence to vary or contradict the writing.”

17 Cyc. 752.

Besides the law set forth above, the company stands in the same position as Gould. It succeeds or fails even as Gould would succeed or fail. Therefore, if the parol evidence rule could be invoked against Gould it should be against the company. The company claims to have paid Gould, and if this is the case they have succeeded to his rights by subrogation. Subrogation is an equitable right and occurs when there is a substitution or when one has labor and expense of defending another's claim.

(37 Cyc. 364, excerpts from cases.)

The rights of a subroger is stated as follows in 37 Cyc. 380:

“He stands in the shoes of the creditor and hence can be subrogated to no greater rights than the one in whose place he is substituted.”

To recapitulate: The New York Life Insurance Company is a party, and not a stranger, to the assignment, (1) because the assignment constituted a written notice to the company; a writing which changed the company's legal relations; (2) because the company, by preparing the writing and accepting the same, has contracted to view the defendant in error as the creditor; (3) because the company, by claiming rights under the instrument, and by subrogation, has become a party to the instrument.

Turning to the next argument which may be made by plaintiff in error, we find that in (b) of the first proposition the plaintiff in error can cite another reason why this evidence of intention is admissible, advancing the argument that "in determining whether or not a gift of a chose in action is intended by the delivery of a writing to a third person for the donee, parol evidence is always admissible," relying on *Ruiz v. Dow*, 113 Cal. 490, and an excerpt therefrom. This is the only authority which can be cited for this proposition.

The rule is there stated as follows (page 497):

"It is insisted that parol evidence was not admissible for the purpose of proving the declarations of Dow as to his intention in making the deed to his wife. By the introduction of this class of evidence it was not intended to vary or contradict the terms of a written instrument and the evidence had no such effect. The question under investigation was, Did Dow, by the deed, intend to make a gift of this note to his wife? *His intention was the all important and controlling question.* That such intention may be proved by his own

declaration made before or after his transaction is elementary. (Thornton on Gifts and Advancements, Secs. 222, 224.)”

The defendant in error does not question the law expressed. He does the application. The excerpt reads plainly: “By the introduction of this class of evidence, it was not intended to vary or contradict the terms of the written instrument *and the evidence had no such effect.*” In other words, the evidence *did not tend to vary or contradict a term* of the writing. The evidence in that case *tended to bolster up* the intention in writing, not to vary or contradict it. There is no statement in the case to contradict this analyzation, and there is to substantiate it, to wit:

“By the introduction of this class of evidence it was not intended to vary or contradict the terms of a written instrument, and the evidence had no such effect.”

There is a possibility that the plaintiff in error will claim that “intention” is not a term of writing; that intention is entirely apart and separate from a written instrument, and that the meaning of the excerpt is that since the intention is apart from the writing and is not one of the terms, parol evidence may be introduced as it does not vary or contradict a term. This position is not tenable, as shown earlier in this brief (Section 18), by citation from Wigmore and the excerpt from the case of Indianapolis v. Kingsbury, 101 Ind. 201, 213, where the court definitely held that the intent was a term.

Assuming that Gould made the declaration claimed, his intention was then *expressed* in two ways,—one *expression* being the *written*, the other *oral*. His *intention* must be gained from one *expression* or the other. One *expression* (written) is “*I give all*”, and denotes that *intention*. The other *expression* (oral) is “*I give part*”. These two expressions are clearly contradictory. Intent is a *term* of a writing as has been shown by the citation to Wigmore referred to above, and the parol evidence rule applies to any term of a writing. In view of this rule of law and its applicability, certainly the declaration can not be admitted.

SECTION 20.

THE SECOND ARGUMENT OF THE DEFENDANT IN ERROR IS THAT, ADMITTING THE EVIDENCE CONTENDED FOR BY THE PLAINTIFF IN ERROR, STILL IT IS OF LESSER WEIGHT THAN THAT ADDUCED BY THE DEFENDANT IN ERROR.

The question to be considered is *intention or lack of intention to give*. The plaintiff in error's position is that Gould made declarations of his lack of intention to give the tontine benefits at the time of executing the assignment. The defendant in error has shown that such is not the case (see Section 17), but for the purpose of argument, the defendant in error will assume that his testimony was to that effect. Then the intention of Gould appears in two forms of evidence,—a *written expression* and an

oral expression. Outside of the parol evidence rule, a writing is a superior form of evidence.

17 Cyc. 799;

In re Irvine, 132 Cal. 602;

Moore v. Grayson, 102 Cal. 606.

Not only is the writing a better form of evidence, but it increases in weight as compared to oral testimony, as the oral testimony is more distant from the date of the writing.

In re Irvine, 132 Cal. 602;

Moore v. Grayson, 102 Cal. 606.

In our case, we have the intention expressed in writing and orally. When put in the balance, the law has said that the intention expressed in the writing will prevail. This is not on the ground of inadmissibility of the oral testimony, but on the ground that the writing is the better evidence; is more likely to be correct. It is a question of the weight which the court by law can accord such testimony.

Moreover, many influences are bearing upon Gould's testifying in 1913 as to his declarations in 1893 tending to warp his memory in regard to the circumstances surrounding his assignment. He is biased since a victory by him will enure to his financial benefit. His bias weakens his testimony.

17 Cyc. 789 has the statement:

"The bias of a witness has a well known and pernicious influence in quickening or deadening the memory." (Citing cases.)

The following are excerpts of decisions by well known judges:

“We easily believe what we wish to be true.”

Turner v. Hand, 3 Wall. Jr. 88, per Grier, J.

“No one with opportunity for observation of judicial proceedings has failed to notice the lamentable infirmities of human recollection and the tendency after the lapse of time to believe that which it is the interest of the witness to appear as the truth.”

Miller v. Cohen, 173 Pa. St. 488, 494.

“It is comparatively easy when witnesses are testifying concerning a transaction that occurred six years ago (ours occurred twenty years ago), and that has become indistinct in the memory, to make the details of the occurrence conform to their present interest.”

Pierce v. Feagans, 39 Fed. 587, 590, per Thayer, J.

Moreover, the courts have always tended to disparage testimony where there is no written corroboration under the party's own hand where written evidence of the fact would be expected.

17 Cyc. 810.

SECTION 21.

THE EVIDENCE SHOWS AN INTENTION TO MAKE AN UNCONDITIONAL DELIVERY OF THE ASSIGNMENT.

The only evidence in the case concerning delivery discloses facts that constitute an unconditional legal delivery. The fact, not Gould's testimony in support

of the fact, but the fact itself, as stipulated to (Stipulation of Facts, Transcript, pages 207, 208 and 101) is that a duplicate original was delivered to the defendant, New York Life Insurance Company. There is absolutely no limitation on the statement of delivery. It is stipulated to as a *fact*, not as *evidence*. The only other statements concerning *delivery* are to be found in the statement of what Gould's evidence would have been if he had been placed on the stand at the trial of the cause in 1913 (Transcript, pages 209 to 211). On pages 24 and 25 of the plaintiff in error's brief, an extended excerpt from Gould's evidence is set forth *as being evidence of a conditional delivery of the assignment to the insurance company. This excerpt is not evidence of a conditional delivery, or any delivery.* The evidence of *delivery* follows this excerpt, but is not contained within the same.

Two requirements are necessary for a gift. (1) An intention to make a gift. (2). A delivery of the *res*. With this definition in mind, what does an analyzation of the excerpt disclose? The first sentence states, "being desirous of assigning * * * conditionally". These words, assumed to be true, disclose a mental state of Gould—his desire. If Gould had such a desire he could carry it out in two ways. 1st: By making a conditional assignment and an absolute delivery, and 2nd: By making an absolute assignment and a conditional delivery. What did he do? He states, "I went to the defendant, New York Life

Insurance Company, and requested * * * to have said policy assigned to my daughter on condition * * *. The agent of the said company had the instrument (the assignment absolute on its face) prepared and I signed the same on the (agent's) assertion that it was an assignment * * * on condition". From the preceding statement can there be any question as to the method he pursued? Without relying on the natural presumption which arises in reading the first part of the sentence, doesn't Gould, in so many words, state, "I intended to make a conditional instrument and an absolute delivery thereof". Is there the least suggestion that he meant to make an absolute assignment and a conditional delivery? Looking at the last sentence of the excerpt, the idea is the same. It is the man's "intention" of *giving* not the intention of "*delivering*" which is expressed in his evidence.

What the company has attempted to do is this—to use Gould's declaration (assuming he made them) to contradict his *intention to give* as expressed in the instrument. If that fails, to use the same declarations of intention, as bearing upon the delivery. This cannot be done. By the analyzation set forth above, it is conclusively shown that Gould's declarations refer to his intention *to give*, not the *delivery*. The statement is made earlier in this brief that there was testimony of *delivery* to be found in Gould's evidence. This evidence immediately follows the excerpt set forth in plaintiff in error's brief, and is in the following words:

“I never delivered said policy on said assignment to the plaintiff, but said policy remained in my possession until I surrendered it to defendant, New York Life Insurance Company. I delivered a copy of said instrument to defendant, New York Life Insurance Company, by reason of the notice appended thereto.”

(Transcript, page 211.)

Nothing is said of conditional delivery. No limitation is placed upon the delivery of a “copy” to the New York Life Insurance Company. The delivery testified to was *absolute and unconditional*. And it was not a “copy” of the instrument that was delivered. It was a duplicate, as shown by the written receipt issued by the insurance company (Transcript, pages 208, 207 and 101).

In conclusion it is to be noted, as was done earlier in this brief, that there is no declaration by Gould, at or near the time of the assignment. All of his declarations are made in 1913, concerning his state of mind in 1893. The evidence is flimsy and unbelievable, bears on a remote state of mind, self-serving, and subject to every criticism of weakened memory through lapse of time, bias and prejudice.

But, viewing the same as competent and believable, still it does not refer to *delivery*. It refers to his intention *to give* until he definitely takes up the subject of *delivery*. In common parlance, when “intention” is used with reference to a gift, the “intention” referred to is the *intention to make a gift*, not the *intention to deliver*. In this case it is not necessary to even refer to this natural understand-

ing. Gould himself, states positively that his "intention" referred to the scope of his gift, not to the scope of his delivery. Assuming his declaration to express the fact, he intended to give part of the policy and make an absolute delivery thereof, and not all of the policy and make a conditional delivery thereof.

SECTION 22.

DEFENDANT IN ERROR HAD A RIGHT TO THE TONTINE BENEFITS ARISING UNDER THE POLICY AS THERE WAS A COMPLETE ASSIGNMENT OF THE POLICY. THERE WAS A LEGAL DELIVERY OF THE ASSIGNMENT.

The proposition set forth in this section was fully covered in Section 11, where it was shown that the facts set forth in the complaint constituted a cause of action. The only factor not present in the facts as set out in the complaint, which is present under the evidence, is the lack of knowledge of the assignment in the assignee. This is not necessary, to a complete assignment either upon the trust theory, or law of gifts.

Martin v. Funk, *supra*;

New York Life Ins. Co. v. Flack, *supra*;

Hewitt v. Provident Life & Trust Co., *supra*;

Northwestern Mutual Life Ins. Co. v. Wright,
supra;

Abegg v. Hirst, *supra*.

All the cases cited in Section 11 recognize the principle that the vital question is one of inten-

tion, i. e., whether the donor intended to divest himself of title. Acceptance of a gift beneficial in nature is presumed.

(a) A delivery to the company is a sufficient delivery. The cases cited by the plaintiff in error, sustain the principles set forth by the defendant in error. In *Scott v. Dickson*, 108 Pa. St. 6, it appears that one of the duplicate assignments was delivered to the company, not both, that the assignee was not a close relative of the assignor, that there was no good consideration, that the assignee was not the minor child, nor the natural ward of the assignor, and then, in spite of the absence of these facts, the court recognized the principles involved and said that there was an intention to give, and the benefits of the policy belonged to the assignee.

In *Spooner's Adm'x v. Hilbish Ex'r*, 23 S. E. 75, the assignee was not a close relative of the assignor; he was not the minor child or ward of the assignor; there was no good consideration, and the assignee admitted he did not receive a copy of the assignment. In spite of this, the court recognizes the principle and favorably comments on the case of *Scott v. Dickson*, *supra*.

The case of *Weaver v. Weaver* is commented on in Section 11 of this brief. An investigation of its discussion by the court in *Northwestern Mutual Life & A. Co. v. Wright*, *supra*, discloses that it is an authority for the defendant in error, not the plaintiff in error.

The criticism of *McDonough v. Aetna Life Insurance Company*, *supra*, is not justified in view of the written receipt of the insurance company contained in the Stipulation of Facts (Transcript, page 208). The court can see that the insurance company received a "duplicate" assignment, not a copy of the original. Moreover, both are originals.

Northwestern Mutual Life Ins. Co. v. Wright, *supra*.

The criticism of *Hurlbutt v. Hurlbutt* is not justified. It is true that the daughter in that case was notified, but she was not living at home. She was of age and not the natural ward of the assignor. His possession could not be deemed her possession. Moreover, viewing only the facts disclosed in the complaint under the proposition of Topic I, there is nothing to show that the assignee was not informed and did not have knowledge.

The point is made by the plaintiff in error that Gould did not inform Mrs. Dunlevy of the assignment after she became of age. By so doing it endeavors to dodge the issue. The question involved is: Did Gould make an assignment in 1893, not what was his desire, at a later time. There is no question but that in 1913 he desired the tontine benefits for himself. He may have had the same desire in 1900, or in 1894, but that desire cannot affect the gift of 1893, if his intention as it then existed, discloses a gift.

(b) In the case of *Jenkins v. Southern Ry. Co.*, 34 S. E. 355, the donor merely executed an instru-

ment. He did not send a duplicate to a third person; he did not even record it, which is a notification to the public, where land is the property, similar to notification of the debtor, where a chose in action is the property. Yet the principle is recognized, and the writer hazards the opinion that if he had recorded the property, the court would have found a completed gift.

Hall v. Waddill, 27 S. W. 937, is an authority in support of Section 11 of this brief. Also, it is an authority under this Topic. The principle contended for is recognized. Under the facts, "delivery—in some legal mode" has been shown. There was a delivery to the insurance company. There was retention of possession by a guardian. There is no "direct negative evidence of any such delivery." As has been pointed out in the preceding section, there is no qualifying statements by Gould concerning "delivery". Moreover, the evidence which has been raked in and set up as evidence bearing upon "delivery" is shown to be subject to the criticism of self-serving, bias, prejudice and untrustworthy from lapse of time.

Cozassa v. Cozassa, 22 S. W. 560, recites a number of facts which "negative the idea of any delivery". They are: "The father never mentioned the making of the deeds, to any of his friends. He continued to use the property as before, paying taxes, making rental contracts, and receiving the rents, taking out insurance in his own name". As contrasted with this situation, in our case, the

donor has mentioned the assignment at least to the insurance company. The subject matter did not permit of rentals thereof, or receiving rents. There is evidence concerning paying premiums, but as said by Judge Van Fleet, in his opinion that "The presumption will not be indulged that he entered upon the transaction with the purpose of doing a thing which would result in a forfeiture of all right under the policy for want of payment of the premiums."

The case of *Masterson v. Check*, 23 Ill. 72, is an authority for the defendant in error and substantiates the view expressed by the writer in criticising *Jenkins v. Southern Ry.*, *supra*.

It is noteworthy that the plaintiff in error does not cite a case in which the principle contended for is not admitted. It is also noteworthy that he cites not a single case where all the factors present in our case were held insufficient to exhibit an intention to divest the donor of his title; he cites not a single case as an authority against the gift where a major part of our facts are present. The cases are without exception either:

1. Where no intention could have been shown except from the making of the assignment and delivery to the company.

2. Where the instrument was merely executed.

Under the *facts of the complaint*, assuming Topic I to be correct, there are the additional facts not found in cases cited by the plaintiff in error: 1. The fact that the assignee was a child of the assignor, a

natural ward, under his care and protection, his possession being hers, and no fact negating knowledge and acceptance of assignee. 2. The fact that there was notice to the debtor, plus the relationship of the assignor and assignee.

Assuming Topic I to be incorrect, under the facts as brought out on the trial, which facts are the same as the complaint, except the evidence of the knowledge of the assignee, testified to in 1913, concerning facts between 1893 and 1913, and objectionable on the grounds of prejudice, bias and lapse of memory, there are the additional facts not found in the cases cited by the plaintiff in error. 1. The fact that the assignee was the child of the assignor, a natural ward, under his care and protection, his possession being hers, and the presumption that she had accepted a gift beneficial in nature, and this presumption not necessarily rebutted by weak, unsatisfactory self-serving evidence. 2. The fact that there was notice to the debtor, plus the relationship of assignor and assignee set forth above.

SECTION 23.

THE SECOND QUESTION WHICH THE TRIAL COURT MIGHT HAVE INCORRECTLY DECIDED IS THE EFFECT OF A JUDGMENT CONCERNING THE SAME SUBJECT-MATTER RENDERED IN THE STATE OF PENNSYLVANIA.

A determination of this question demands a close examination of the record, which was attached to the answer of the plaintiff in error (Transcript,

pages 43 to 194 inc.). In the so-called Stipulation of Facts it is agreed by counsel that the copy of the Pennsylvania court record attached to the answer is a correct copy (Transcript, page 207). The action was commenced by Boggs and Buhl, against Effie J. Gould Dunlevy, the present defendant in error, upon an indebtedness incurred by her while she was living within the State of Pennsylvania (Transcript, pages 43 to 45, inc.). Summons in this action was served upon Mrs. Dunlevy by leaving the same with an adult member of her family. It was not personally served, as stated in plaintiff in error's brief (Transcript, page 59). Mrs. Dunlevy did not appear and judgment was entered in favor of Boggs & Buhl (Transcript, page 59). Execution attachment on the judgment was issued naming the present plaintiff in error and Joseph W. Gould as garnishees (Transcript, pages 64 to 67, inc.). In answer to interrogatories concerning property of Mrs. Dunlevy presented to them, the garnishees set forth the assignment which is the subject matter of this cause (Transcript, pages 71 to 81, inc.) and the New York Life Ins. Co. prayed to be advised what its duties were (Transcript, page 81).

Thereafter the New York Life Ins. Co. petitioned to have Boggs & Buhl, Gould and Mrs. Dunlevy interplead to determine whether the assignment was good and who was the owner of the fund in its hands and to make payment thereof to the owner (Transcript, pages 122 to 128, inc.). An order was made by the court to that effect, and stated among

other things that Mrs. Dunlevy was a resident of the State of California (Transcript, pages 128 and 129). Under the order and rule for interpleader, Mrs. Dunlevy was personally served with summons within the State of California (Transcript, pages 135 to 145, inc.). In the garnishment action by Boggs & Buhl against Gould, to determine whether or not the latter had any property of Mrs. Dunlevy in his possession, a feigned issue was arranged to determine the validity of the assignment, and calling upon creditors of Mrs. Dunlevy to become parties thereto (Transcript, page 149). Consent of various creditors to the action of Boggs & Buhl v. Gould were received and these creditors were made parties plaintiff. Judgment was for the defendant (Transcript, page 192) and a judgment was entered upon the docket (Transcript, page 174).

Prior to the date (Transcript, pages 128, 129), upon which an order was made on the petition for interpleader presented by the insurance company, directing a payment of a fund into court, the District Court had jurisdiction over all the parties and the subject-matter of this cause (Transcript, pages 11 and 24).

SECTION 24.

**POINTS TO BE MADE BY THE DEFENDANT IN ERROR WITH
A VIEW OF REBUTTING POINTS MADE BY THE PLAINTIFF
IN ERROR IN TOPIC B OF ITS BRIEF.**

With these facts in mind, let us consider the points made by the plaintiff in error. The arrangement is:

1. Dual character of the proceedings in Pennsylvania.

2. Payment of money into the Pennsylvania court bars a recovery, as

(a) The law of Pennsylvania allows a garnishee to pay funds into court, and he is protected from further payment.

(b) The garnishee, by the Pennsylvania court is not concerned with the outcome of a feigned issue.

(c) The defendant in error's recourse, if any, is against the prothonotary.

3. Defendant in error is bound by the Pennsylvania judgment in the feigned issue proceedings.

4. An affirmance of the judgment will compel a second payment of the indebtedness.

In answer to these propositions the defendant in error will point out that:

1. The character of the proceedings in Pennsylvania are incorrectly stated in the plaintiff in error's brief (Section 25).

2. That neither the payment of the amount of indebtedness into the Pennsylvania court, nor the feigned issue judgment constitutes a bar to this action (Section 26).

SECTION 25.

**THE CHARACTER OF THE PROCEEDINGS IN PENNSYLVANIA
ARE INCORRECTLY STATED IN THE BRIEF OF THE PLAINTIFF
IN ERROR.**

The impression that a reader of the plaintiff in error's brief receives is that the New York Life Ins. Co. has been rather badly treated; that it was forced to pay certain money into the Pennsylvania court, and should not now be forced to make a second payment of an indebtedness. At the time the payment of the money into the Pennsylvania court, the New York Life Insurance Company knew that an action had been commenced in California. It knew that all the parties who could claim an ownership in the debt were served and therefore within the jurisdiction of the State of California. Knowing this unquestioned fact of jurisdiction, it proceeded to chose the Pennsylvania courts of questionable jurisdiction, as the arbiter of the ownership of the debt. The action of submitting a fund to the jurisdiction of the Pennsylvania court was not forced upon the insurance company. It requested the privilege and the privilege was granted. And now, having made a mistake in its choice of courts, the insurance company, on appeal from a judgment against it, cites as a factor to be considered by the Appellate tribunal, that because of its mistake, the owner of the debt, assuming Mrs. Dunlevy is the owner, should not get the fruits of that ownership. The impression is not a fair one and the writer of this brief desires to call the court's attention to this fact at the outset.

It is also desirable to note that the statement that Mrs. Dunlevy was "personally served in the State of Pennsylvania" (plaintiff in error's brief, page 33), is also misleading. The defendant in error does believe that the service in question is a good service for the purpose of garnishment, providing the courts of Pennsylvania determined that the New York Life Insurance Company were indebted to Mrs. Dunlevy, but does not believe that Mrs. Dunlevy was "personally served in the State of Pennsylvania". Personal service by doctrines of conflicts of law has come to mean the serving of process upon a person, himself, within the confines of the sovereign that issues the process. The statement in question is incorrect and misleading.

SECTION 26.

NEITHER THE PAYMENT OF THE AMOUNT OF THE DEBT INTO THE COURT BY THE NEW YORK LIFE INSURANCE COMPANY, NOR THE FEIGNED ISSUE JUDGMENT, CONSTITUTES A BAR TO THE ACTION IN THE FEDERAL DISTRICT COURT.

The full position of the plaintiff in error is disclosed in the following statement:

"The New York Life Insurance Company having been garnished by one of Mrs. Dunlevy's creditors under a valid judgment which was binding upon her, had the right to pay what it owed Mrs. Dunlevy into Court. It did pay the proceeds of the policy into Court and having done so was no longer concerned with the ultimate disposition of the money."

(Plaintiff in error's brief, pages 36 and 37.)

To maintain the proposition of the plaintiff in error, it is necessary that:

1. The New York Life Insurance Company was correctly served with garnishment process.

2. That the New York Life Insurance Company was indebted to Mrs. Dunlevy.

3. That the "indebtedness" was property within the State of Pennsylvania.

The first requirement the defendant in error admits to be present. The insurance company was correctly served with garnishment process, according to the law of the State of Pennsylvania.

The presence of the second requirement, as it is related to the proposition to be sustained, the defendant in error denies. It is necessary to explain the preceding statement. There is no question in the writer's mind, nor, so it seems, in the mind of the federal District Court, but that the New York Life Insurance Company was indebted to Mrs. Dunlevy; but there was more than doubt,—there was certainty in the mind of the Pennsylvania court that such was not the case. By a subsequent proceeding and collateral with the garnishment to wit: the feigned issue, the court of Pennsylvania determined that Mrs. Dunlevy at no time had property within the State of Pennsylvania; that, if there was an indebtedness due from the insurance company, it was due to Gould, not to Mrs. Dunlevy. Inasmuch as "attachment is a creature of the local law" (*Harris v. Balk*, 198 U. S. 215), and inasmuch as the local law concludes, that, though garnishment process

was correct, yet it did not arrest any property of Mrs. Dunlevy, any fund disposed of by the insurance company could not have been property of Mrs. Dunlevy.

The third requirement was not present. To a limited extent only was the debt, property within the State of Pennsylvania. This proposition leads us to a discussion of the composition of a debt, and where its situs is to be found.

A debt is composed of the *obligation of the debtor to pay*, and the chose in action or *right of the creditor to be paid*. The situs of a debt in view of the preceding definition could be

1. Where both debtor and creditor can be found.
2. Where the debtor can be found.
3. Where the creditor can be found.

The writer believes that the first theory has no followers. Moreover, assuming that Mrs. Dunlevy was the creditor and served in California, certainly Pennsylvania has no jurisdiction over the debt.

The second theory has followers. It is a well recognized principle of law that for purposes of garnishment, the situs of a debt is with the debtor. This is true because garnishment process is directed toward the *obligation to pay*, which is the *debtor's phase of the debt*.

Louisville & Nashville Ry. v. Deer, 200 U. S.
176;
Harris v. Balk, *supra*.

But the courts do not go farther and say that the situs of the debt for all purposes is with the debtor. In the case of taxation the situs of a debt is with the creditor.

Chicago Ry. v. Sturm, 174 U. S. 714;

Kirtland v. Hotchkiss, 100 U. S. 491.

And in this latter case the late Justice Harlan vouchsafes the opinion that

“The debt in question, although a species of intangible property, may, for purposes of taxation, *if not all purposes*, be regarded as situated at the domicile of the creditor”.

The writer believes that the latest expression deems the situs with the creditor, personally, not at his domicile. This seems to be a correct statement of the law, for property is deemed to be an asset and certainly the obligation to pay cannot be deemed to be an asset of the debtor. The *chose in action is the asset*. It is the right of the creditor and is present with him.

If the law is as expressed in the preceding paragraphs, it can be seen that neither the Ry. Co. v. Deer, *supra*, nor Harris v. Balk, *supra*, are authorities for fixing the situs of this particular debt, so as to give Pennsylvania jurisdiction over the res. The garnishment process, it was held by the Pennsylvania court, was ineffective. This determination concludes the question of fixing the situs by garnishment.

Ry. Co. v. Deer, *supra*, and Harris v. Balk, *supra*, are cases where no question arises over the owner-

ship of the debt. They are authorities upon the question of service of garnishment process, assuming the judgment debtor was the creditor of the garnishee. They are not authorities for a case where the local court found that though there was garnishment process issued, it arrested no debt of the judgment debtor.

Under the third theory, the State of Pennsylvania had jurisdiction over the res, if Gould was the creditor. It did not have jurisdiction over the res, if Mrs. Dunlevy was the creditor. In the latter case the State of California had jurisdiction over the res. A proper determination of jurisdiction under this third theory necessitates first a determination of ownership of the chose in action.

According to the law of the State of New York, there was a good assignment of the chose in action to Mrs. Dunlevy (see Section 11).

The assignment, it was agreed by the New York Life Insurance Company, and Gould, would be determined as its validity by the law of the State of New York.

(Transcript, pages 97 and 101).

With the preceding analyzation in mind, let us take up the plaintiff in error's argument that under the heading "The law of Pennsylvania gives a garnishee a right to pay his debt into court, and, having done so, he is protected from subsequent action by the judgment debtor" (plaintiff in error's brief, page 37). Authorities are set forth which

tend to prove the proposition. These are decisions by the State of Pennsylvania, upon situations different from the one at bar. It does not appear in any of them that personal jurisdiction was not had upon all claimants to the fund, nor does it appear that any question of personal jurisdiction ever arose, or was considered. The decisions are merely authorities for the proposition that the garnishee is safe in paying the amount of a debt into court when the court had personal jurisdiction over all claimants thereto. That the State of Pennsylvania would recognize such a judgment without personal jurisdiction is more than doubtful. That another state would not recognize such a judgment without personal jurisdiction is a certainty.

To come back to the proposition itself: What does it stand for? The reference is entirely to a right given by the law of Pennsylvania. It may be conceded that Pennsylvania gives the right, but the law of Pennsylvania is not the standard by which this act is judged. The constitution of the United States sets up the rule that "full faith and credit" must be given by one state to the judicial proceedings of another state. What is "*full faith and credit*"? Is it the standard the State of Pennsylvania declares is correct? No, it is the standard declared by all decisions under the designation of conflicts of law. By this standard it is recognized that where a state undertakes to determine personal rights, it must have jurisdiction over the parties.

Pennoyer v. Neff, 5 Otto (U. S.) 174.

Consequently, though the garnishee may be protected within the State of Pennsylvania by payment of certain money into court, he is not necessarily protected in other jurisdictions.

Other faults that the writer finds with this proposition are that "garnishee" is not defined, and that "judgment debtor" is incorrectly assumed. If by "garnishee" is meant the person named in garnishment process and served therewith, the writer can offer no objection. But, certainly, if by this word the plaintiff in error means not only one named in and served by garnishment process, but also one who in addition thereto is indebted to the judgment debtor, the writer does object. The standard set up by the plaintiff in error, and which is the correct standard in cases of *garnishment*, is the law of Pennsylvania. This standard states that the named "garnishee" was not indebted to the named judgment debtor. Consequently, if the latter definition is the one intended by the plaintiff in error, the proposition assumes a situation denied by the standard it sets up.

By the same standard there was no "judgment debtor" of the named "garnishee." Consequently the proposition makes a second assumption denied by the standard it sets up.

The next proposition of the plaintiff in error is that "under the Pennsylvania law the garnishee is not a proper party to, and is not concerned with the outcome of the feigned issue" (plaintiff in error's brief, page 40).

The writer believes this proposition is correct if it goes no farther then the statement that the named garnishee is not a party to the feigned issue proceedings. Certainly, however, it cannot be said that the New York Life Insurance Company is not concerned therewith.

The only standard set up by the plaintiff in error in this proposition as to the sufficiency of the insurance company's action, is as in the previous proposition the law of Pennsylvania. But, as shown above, this is not the correct standard, except as to the sufficiency of the garnishment. The standard of *garnishment* states, "No effective garnishment". The standard of *disposition of personal rights* states, "no effective disposition of personal rights." And consequently, from this latter standard, the insurance company is concerned with the outcome of the feigned issue, for as has already happened, the feigned issue judgment has not proven a bar to a California action for the recovery of an indebtedness.

The next proposition is that if "defendant in error was harmed * * * her only recourse would be against the prothonotary * * *." The assumption here is that Mrs. Dunlevy could be harmed by a payment of *Gould's* money to Gould, or by a payment of the *insurance company's* money to Gould. The plaintiff in error confuses his standards. By the Pennsylvania law this money was Gould's. If the Pennsylvania law is mistaken, *the money is not Mrs. Dunlevy's*, but belongs to the New York Life Insurance

Company. It converted, or attempted to convert, a debt into money. As a fact, it paid money to the court. The money could not have been Mrs. Dunlevy's, for if she owned anything, it was a "chose in action", not money. If the insurance company was indebted in favor of Mrs. Dunlevy, in Pennsylvania, it had a right, perhaps, to convert the same into money. But, the law of Pennsylvania, as the correct standard of garnishment, stated it was not indebted to Mrs. Dunlevy in Pennsylvania; consequently, any payment of money by the insurance company in Pennsylvania does not concern Mrs. Dunlevy.

The next proposition of the plaintiff in error is that "Defendant in error is bound by the Pennsylvania judgment in the feigned issue proceedings" (plaintiff in error's brief, page 44). Here again occurs the confusion of standards. *Harris v. Balk*, *supra*, and *Railway Company v. Deer*, *supra*, are authorities to the effect that a debt can be garnished wherever the debtor can be found. They are also authorities for the proposition that the local law determines the effectiveness of the garnishment, thus setting up the local law as a standard of the garnishment proceedings. They are not authorities for the proposition that where the garnishment proceedings are ineffective, that still the local law can determine the ownership of debt. The confusion in thought is well set out in these words: "So in the present case had the question involved been the ownership of tangible property, situated in the

State of Pennsylvania, the judgment—would unquestionably have been binding on the defendant in error. And we submit that the rule in regard to choses in action and choses in possession is not at all different'' (plaintiff in error's brief, page 49). The conclusion is all wrong. Tangible property exists in the physical word, and must have space. When it occupies space within the State of Pennsylvania, that state has jurisdiction over it. Intangible property has no physical existence. It is composed, as was stated earlier in this brief, of the debtor's obligation to pay and the creditor's right to sue. For garnishment purposes the debt, assuming it was Mrs. Dunlevy's, was present in every state in the Union, where the insurance company had agents, and where the local law issued effective garnishment process. The chose in action, assuming Mrs. Dunlevy the owner thereof, was only in California. If, as was the case, the law of Pennsylvania has decided it did not garnish property of Mrs. Dunlevy, then it could have jurisdiction only by personal service on the creditor. This it did not have.

Moreover, as was stated earlier in this brief, where the entire object of the action was the ownership of a chose in action, there must be personal jurisdiction over the defendants. The rule is laid down in *Pennoyer v. Neff*, *supra*, in these words:

“Where the entire object of the action is to determine personal rights and obligations of the defendants, that is where the suit is merely

in personam constructive service in this form upon a non-resident is ineffectual for any purpose."

It is respectfully submitted that the feigned issue in Pennsylvania was directed to the personal rights of Gould and Mrs. Dunlevy, that it was not directed against property within the State of Pennsylvania, and that it was distinctly *in personam*.

An affirmance of the judgment will compel a second payment.

This proposition was discussed earlier in this brief; at that time it was pointed out, that the payment was made under a petition by the insurance company and with a full knowledge of the unquestioned jurisdiction of California. The basis of the proposition is found in the statement, "It paid it under process of a court of competent jurisdiction." This, of course, is incorrect. The State of Pennsylvania did not have jurisdiction.

While it is not desirable to have any one pay an indebtedness twice, it is less desirable to protect payments made without investigation of the merits of a claim. The New York Life Insurance Company did not sufficiently investigate either the ownership of the debt, nor the jurisdiction of the two courts. Moreover, the courts will not defeat the title of an owner, merely because the debtor made an unfortunate mistake.

The New York Life Insurance Company cannot, therefore, be heard complaining of a second payment.

· Respectfully submitted,

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No. 2349

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY (a corporation), and JOSEPH W. GOULD, <i>Plaintiffs in Error,</i>	}
VS.	
EFFIE J. GOULD DUNLEVY, <i>Defendant in Error.</i>	}

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR, NEW YORK LIFE INSURANCE COMPANY.

This brief is in response to the technical objection raised by defendant in error at pages 1 to 21 of her brief.

The claim of defendant in error is that the points raised by plaintiff in error are not properly presented for review in this court because the trial court did not make special findings of fact pursuant to Sections 649 and 700, Revised Statutes.

Counsel concede in their brief that an agreed statement of facts takes the place of special findings within the meaning of Sections 649 and 700, Revised Statutes.

Wayne County v. Kennicott, 103 U. S. 554.

It is asserted, however, that only such agreed statements as settle the "ultimate" facts as distinguished from "evidentiary" facts, take the place of special findings, and counsel rely in that contention upon

Wilson v. Merchants Loan & Trust Co., 183 U. S. 121; 46 L. ed. 113.

In the case at bar the record discloses

(1) A stipulation in two parts.

(a) Part I being prefaced:

"It is hereby stipulated as facts * * *."

(b) Part II being prefaced:

"It is hereby stipulated and agreed that the defendant, Joseph W. Gould, would, if called as a witness in the above entitled action, testify as follows: * * *"

(2) A duly authenticated bill of exceptions including

(a) The above stipulation (Tr. p. 206),

(b) One page of testimony by the plaintiff (Tr. p. 212),

(c) A recital that the agreed statement of facts, the stipulated testimony of Gould, and the one page of testimony given by the plaintiff, constituted all the evidence given and proceedings had on the trial of the case (Tr. p. 213).

It is submitted by plaintiff in error

(1) That Part I of the stipulation covers all of the facts upon which the determination of the question of

laws presented on the writ of error are dependent, with the exception of two purely secondary points.

(2) That Part I of the stipulation is a stipulation as to “ultimate” facts as distinguished from “evidentiary” facts.

(3) That in any event the judgment should be reversed for the District Court’s error in overruling the demurrer.

I.

PART I OF THE STIPULATION SHOWS A COMPLETE AGREEMENT AS TO ALL THE FACTS RELATING TO THE PRINCIPAL ISSUES PRESENTED FOR REVIEW.

The apparent logic of the Revised Statutes is to give the Circuit Court of Appeals the right to review questions of law only as distinguished from questions of fact. The statutes aim to make the District Court the sole arbiter of the facts in cases tried without a jury. They aim also to allow the Circuit Court of Appeals thereafter to pass upon the question as to whether or not the District Court entered the proper judgment either upon facts which are found, or facts which are stipulated to.

The reason the judgment was affirmed in the *Wilson* case and in the other cases which follow it, was that in those cases the District Court had not performed its function of finding facts upon a given issue. Thus in the *Wilson* case, it was distinctly pointed out that as to the main issue in the case there was nothing tantamount to a finding. The court said:

“The difficulty we meet, which prevents the decision of the case from resting on the statement of facts, lies in the omission therefrom of any finding or agreement upon the question of fact whether the pledgeor had or had not consented to the change; and instead of any such finding or agreement there is placed in the statement certain correspondence from which, together with other facts stated, an inference of consent or perhaps ratification might be drawn, but is not found or agreed upon, thus leaving the ultimate fact of consent or nonconsent a matter of inference, and an inference of fact, and not of law; and this is a material fact arising upon the statement as agreed upon.”

Part I of the stipulation of facts in the case at bar was as complete an agreement as to what the facts, and as to what *all* of the facts, relating to the principal issues presented to the District Court, were, as could have been drawn by the parties. It is not ordinarily necessary to embody an agreed statement in a bill of exceptions, but the function of the bill of exceptions in this case is to show, and it does show, that there was no evidence whatever submitted upon the particular issues which Part I of the stipulation of facts covered. As to those issues all of the facts were agreed upon.

Part II of the stipulation was a stipulation as to Gould's testimony (Tr. pp. 210-211). That testimony had no bearing upon any of the questions presented to the District Court, except (a) as to Gould's intention in making the assignment, and (b) as to the alleged conditional character of delivery of the assignment, if in fact there was any delivery at all.

The single page of testimony given by Mrs. Dunlevy (Tr. p. 212), did not materially affect any issue.

The bill of exceptions discloses that Gould's stipulated testimony, and Mrs. Dunlevy's actual testimony, were the only other elements which the court considered in deciding the case, in addition to Part I of the stipulation. It is definitely and conclusively established, therefore, before this court, that as to all of the issues other than the last two above mentioned, Part I of the stipulation was a complete and full agreement of the "ultimate" facts.

Plaintiff in error's first point for reversal is that Mrs. Dunlevy was without title to the tontine benefits under the policy and that a judgment permitting her to recover them was erroneous for that reason. In support of this branch of the argument, it was submitted:

(1) That there was no delivery whatever of the assignment (Brief of Plaintiff in Error, pp. 13-24);

(2) That if the court found a delivery from the facts stipulated, it was shown to be conditional by Gould's uncontradicted testimony (Brief for Plaintiff in Error, pp. 24-29);

(3) That there was no gift of the tontine benefits to Mrs. Dunlevy because Gould intended her to have only the death benefits as disclosed by Gould's uncontradicted testimony (Brief of Plaintiff in Error, pp. 29-33).

It is apparent that the first of these points, that is to say, whether there was *any* delivery at all, rests entirely

upon the stipulated facts in Part I of the stipulation. The question as to whether or not there was any delivery at all of an assignment of the tontine benefits from Gould to Mrs. Dunlevy is, therefore, open to consideration by this court.

The second and third points with respect to delivery are, it is true, dependent upon Gould's testimony. But these points were both secondary. If from the facts stipulated, this court concludes that there was no delivery at all, there will be no need for considering the other points.

As to the defense of the Pennsylvania proceedings (Brief of Plaintiff in Error, pp. 33-50), Part I of the stipulation is complete beyond question. There is not a word in Gould's stipulated testimony, or in Mrs. Dunlevy's brief oral testimony, in any way relating to the Pennsylvania proceedings. All of the facts regarding these proceedings are covered by Part I of the stipulation of facts. These facts are categorically set forth, as in special findings, and it is finally stipulated that the transcript of the proceedings in the Pennsylvania court, which is annexed to and made a part of the defendant's answer, correctly sets forth the facts bearing upon this defense. The most satisfactory form in which special findings can be drawn is to draw them so that they find for or against the allegations of the pleadings. Certainly where a stipulation of facts refers to a pleading and declares that certain allegations thereof are true, it cannot be contended that such a stipulation is of "evidentiary", as distinguished from "ultimate" facts. The "ultimate" facts are the facts

to be proved, in other words the facts alleged in the pleadings.

It has been distinctly held by the federal courts that in making special findings it is proper for the District Court to find by reference to exhibits set out in pleadings.

Wesson v. Saline Co., 73 Fed. 917;

Corliss v. Pulaski Co., 116 Fed. 289.

We have in this case, therefore, a stipulation of facts corresponding to special findings, which stipulation covers some of the issues of law and not others. In such a case the Circuit Court of Appeals may review the issues that are covered by the stipulation, although it may be precluded from considering others. This has been directly held in

Anglo-American Land M. & A. Co. v. Lombard,
132 Fed. 721, 735.

Mr. Justice Van Devanter, speaking for himself and Justices Sanborn and Thayer of the Eighth Circuit, in 1904, said:

“While the special finding under consideration does not meet the requirements of the Act of Congress, it does sufficiently respond to some of the issues raised by the pleadings, although not responding to others. In this situation the finding may be examined to ascertain whether the ultimate facts found and stated therein are decisive of the controversy, and determine what judgments should be rendered, irrespective of any response which could be made to the issues upon which the finding is silent. **If, under a correct application of legal principles, the facts adequately found and stated determine the cases, the imperfection in the special finding becomes immaterial, and the present judg-**

ments must be affirmed, or other judgments must be directed in their stead, as the facts found and stated may require."

We submit that upon the foregoing authority there can be no question that this court has full power to reverse the judgment of the District Court in the present case for any of the following causes:

(1) If it concludes as a matter of law upon the facts stipulated to in Part I of the stipulation, there was no delivery of the assignment from Joseph W. Gould to the defendant in error (Brief of Plaintiff in Error, pp. 13-24);

(2) If it concludes as a matter of law that the facts with respect to the proceedings in Pennsylvania as contained in Part I of the stipulation constituted a valid defense (Brief of Plaintiff in Error, pp. 33-50).

II.

PART I OF THE STIPULATION IS A STIPULATION OF "ULTIMATE" FACTS AS DISTINGUISHED FROM "EVIDEN- TIARY" FACTS.

We have shown that as to the issues of non-delivery of the assignment and as to the defense based on the Pennsylvania proceedings, all of the facts are contained in Part I of the stipulation.

But it is claimed by defendant in error that the stipulation of facts is a stipulation of "evidentiary" as distinguished from "ultimate" facts within the rule of *Wilson v. Merchants Loan & Trust Company, supra*.

This contention cannot be sustained. Looking at the facts which are contained in Part I of the stipulation and which bear upon the question of non-delivery of the assignment, it is clear that there is no basis whatever for arguing that the facts ~~submitted~~^{stipulated} to are "evidentiary". The parties stipulated to what actually occurred, and as to what did not occur. Step by step, everything that was done by Joseph W. Gould is set forth. We submit that it would be impossible to suggest a more appropriate form in which these facts could have been presented in respect to this issue, if the court had been making a special finding upon it. With respect to this issue, not a single fact is contained in the stipulation which in any sense could be claimed to be "evidentiary".

With respect to the defense of the Pennsylvania proceedings a number of definite facts are stipulated to in Part I of the stipulation, and then the stipulation concludes with the agreement:

"That the exemplification of record annexed to defendant New York Life Insurance Company's amended answer herein, and marked Exhibit 'A' is a full, complete and correct exemplification of the entire record of all proceedings had in the courts of the State of Pennsylvania with reference to the policy of life insurance and the moneys involved in the above entitled action."

The first answer we make to the claim that these facts so stipulated to with respect to the plea in bar were "evidentiary" has already been suggested. Where a party refers to a pleading and stipulates that the allegations thereof may be deemed true, we think that it is apparently futile for such a party to claim that the

stipulation is a stipulation of evidence. But aside from this consideration, it is submitted that the facts themselves which are set forth in the amended answer were not "evidentiary" but were "ultimate" within the meaning of the rule of the *Wilson* case.

When a judgment is pleaded in bar, it may upon its face disclose that it is a proper defense. It may be apparent from the judgment itself that in the case in which the judgment was rendered and in the case at bar all of the essentials of a valid plea of *res judicata* were present, namely, unity of parties and unity of issues. It may, however, be necessary to establish such identity of parties or issues by introducing the proceedings leading up to the judgment. Where this is done every fact that relates to the obtaining of the judgment is an "ultimate" fact from which it may be determined as a matter of law that there was a unity of parties and a unity of issues so that the judgment might constitute a defense.

23 Cyc., 1535;

Gray v. Dougherty, 25 Cal. 266;

Barnum v. Reynolds, 38 Cal. 643;

Wixon v. Devine, 67 Cal. 341;

Page v. Garver, 5 Cal. App. 383.

In the present case had the court made a special finding upon the proceedings in Pennsylvania, it could not have found in terms that plaintiff was or was not barred from recovering by such proceedings. Such a finding would not have been a finding of fact but a conclusion of law. Had the court been making a finding of

fact, it would have found precisely what proceedings were had in Pennsylvania, and to do this, it would have been compelled to find exactly what is set out in the amended answer.

That the rule which ~~plaintiff~~^{defendant} in error has invoked is not to be carried to the highly technical and unreasonable length to which defendant in error contends, was the opinion of Judge Seaman, speaking for the judges of the Seventh Circuit in 1908 in the case of

South Chicago Elevator Co. v. United Grain Co.,
165 Fed. 132, 135.

In that case the defendant in error was contending that the special findings which had been made in the lower court were subject to the same objection as that now raised by defendant in error to the stipulation of facts in this case. It was claimed that the special findings were findings of "evidentiary" facts and not of "ultimate" facts, and that, therefore, the Circuit Court of Appeals could not consider the question of a sufficiency of such findings to support the judgment.

We call to the attention of the court the fact that in this case Judge Seaman was dealing with findings which embodied a long series of transactions between the parties, consisting of correspondence, meetings and other dealings between the parties. Judge Seaman points out that all of these facts entered into and were a part of the question as to whether or not a contractual relation existed between the parties; that this question was a question of law and that, therefore, the special findings

were not subject to the objection urged by the defendant in error.

It is to be noted that Judge Seaman particularly distinguishes the case upon these grounds from the case relied upon by counsel for defendant in error herein, namely, the *Wilson* case. Judge Seaman said:

“For the purpose of review, the rule is well settled that the law of the case must be determined from a finding by the trial court of ultimate facts in issue—its ‘finding of the propositions of fact which the evidence establishes and not the evidence on which these ultimate facts are supposed to rest’. *Norris v. Jackson*, 9 Wall. 125, 127, 19 L. ed. 608; 7 Notes U. S. Rep. 148; *Wilson v. Merchants’ Loan & Trust Co.*, 183 U. S. 121, 127; 22 Sup. Ct. 55; 46 L. ed. 113. So any inferences of fact to establish an ultimate fact in issue cannot be supplied by this court from evidence recited in the findings of facts which are merely evidential in character and not final, in the absence of a finding by the trial court, of the ultimate fact. **We are of opinion, however, that the facts upon the issue under consideration are settled by the findings within the foregoing rule.** Written communications between the parties are set out therein, bearing date from August 27th to September 6, 1904, which contain their respective negotiations and propositions for handling and storing grain for a year, with acceptance by the plaintiff of the defendant’s proposition, thus stated in the plaintiff’s letter of September 6th:

‘We therefore accept your proposition to handle your grain at one-half cent per bushel, the minimum amount to be handled during the year to be 5,000,000 bushels. We should be glad to commence business with you at your earliest convenience.’

Thereupon it is distinctly stated and found, in substance, that the parties met personally, prior to September 6th, and arranged for a subsequent

meeting to settle the terms of a contract, and within ten days after that date met and 'agreed upon the following memorandum of agreement, which they at the same time and place agreed should be subsequently put into a formal written contract,' setting out the memorandum, which contains minor provisions for service not in controversy, and fixes 'one-half of a cent per bushel' to be paid for elevation of the grain and 5,000,000 bushels as the minimum amount to be handled in the year. The meaning of these provisions in memorandum and letter is not only clear, but uncontroverted. It is further stated and found that the principals met in December, 1904, and that 'it was then agreed between them, acting for the parties to this suit, that it was unnecessary to reduce the agreement to a formal written contract, as they were doing business under the contract and had an abundance of letters and memorandum to show what had been agreed upon; * * * that shortly after the receipt of the letter' of September 6th, above mentioned, the defendant proceeded to deliver the grain in question, 'and on the 12th day of September, 1904, the plaintiff began' its service under the alleged agreement, and so continued 'for the whole period of 12 months'; and 'that both the plaintiff and the defendant believed a contract existed between them, which contract was evidenced by letters and memoranda' set forth.

The facts thus found are the ultimate facts under the issue, whether an express contract existed between the parties—not merely evidential facts which leave an inference of fact to be determined, as contended on behalf of the defendant—and are thus plainly distinguishable from the findings involved in *Wilson v. Merchants' Loan & Trust Co.*, *supra*, cited and discussed in the brief for the defendant. They settle, as we believe, (a) that all terms of the proposed contract for delivery and storage of the grain in question are set forth in these letters and written memorandum; (b) that the parties met and

agreed thereupon as their contract; and (c) that the plaintiff's service in suit was in performance thereof. **With facts so found, the only deductions to be drawn under that issue were conclusions of law, either as to the validity of the agreement or interpretation of the written instrument thus agreed upon."**

III.

IN ANY EVENT THE JUDGMENT SHOULD BE REVERSED, FOR THE DISTRICT COURT'S ERROR IN OVERRULING THE DEMURRER.

The ninth assignment of error is as follows:

"IX.

Said court erred in overruling the demurrer of said defendant, New York Life Insurance Company, a corporation, to plaintiff's complaint."

(Tr. p. 229.)

The first four grounds of the demurrer were as follows:

"I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant New York Life Insurance Company.

II.

That said complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom whether the assignment therein mentioned was ever delivered to the plaintiff herein.

III.

That said complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom, whether said assignment was ever de-

livered to a person other than the plaintiff herein, for or on behalf of the said plaintiff, or for her benefit.

IV.

That said complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom, that said assignment was delivered to New York Life Insurance Company, or that the defendant New York Life Insurance Company ever received delivery of the said assignment for or on behalf of plaintiff."

(Tr. pp. 14 and 15.)

The allegations of the complaint to which these specifications of demurrer were directed were as follows:

"That on or about the 27th day of June, A. D. 1893, when the plaintiff herein was thirteen years of age, the defendant Joseph W. Gould *made and executed* a certain instrument in writing which was and is in words and figures following, to wit:"

(Here the assignment from Joseph W. Gould upon which the plaintiff relied is set forth verbatim.)

"* * * and delivered the same to New York Life Insurance Company * * *."

Defendant in error cannot fall back upon the rule that an allegation of delivery is to be drawn from the allegation that the assignment was "*made and ^{executed} ~~delivered~~*". The allegation here is that Gould "*made and executed*" the assignment and "*delivered it to the New York Life Insurance Company*". There is no allegation that he delivered it to Mrs. Dunlevy directly or to the New York Life Insurance Company *for Mrs. Dunlevy*. For this reason the demurrer should have been sustained both upon the general and special grounds assigned.

CONCLUSION.

The District Court erred in rendering judgment for defendant in error because:

(1) Upon the "ultimate" facts embodied in Part I of the stipulation it conclusively appears as a matter of law that Joseph W. Gould never delivered the assignment of the policy to Mrs. Dunlevy;

(2) Upon the "ultimate" facts embodied in Part I of the stipulation it conclusively appears as a matter of law that Mrs. Dunlevy was barred from recovery in this action by the proceedings in the courts of Pennsylvania;

(3) The demurrer of the defendant to the complaint should have been sustained.

These errors are properly presented to this court for review. They have occasioned an unconscionable judgment. Defendant in error's attempt to uphold that judgment depends upon an unreasonable construction of Sections 649 and 700, Revised Statutes, a construction that has been repudiated by the learned judges of the seventh and eighth circuits as being opposed to the logic and spirit of those statutes.

This judgment should be reversed.

Dated, San Francisco,

March 25, 1914.

E. J. McCUTCHEN,

WARREN OLNEY, JR.,

CHARLES W. WILLARD,

J. M. MANNON, JR.,

*Attorneys for Plaintiff in Error, New
York Life Insurance Company.*

No. 2349

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY (a corporation), and JOSEPH W. GOULD, <i>Plaintiffs in Error,</i>	}
vs.	

EFFIE J. GOULD DUNLEVY, <i>Defendant in Error.</i>	}

PETITION OF PLAINTIFF IN ERROR, NEW YORK LIFE
INSURANCE COMPANY, FOR A
REHEARING.

*To the Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

The plaintiff in error New York Life Insurance Company respectfully asks a rehearing in this case, that further consideration may be given to a single point which we apprehend has been misconceived in the majority opinion.

We respectfully submit that the court has either failed to note that Mrs. Dunlevy was served with

process in the Boggs & Buhl suit, that is, the suit in which the execution attachment writ was issued against the New York Life Insurance Company, or that the court has failed to apply the rule cited in the leading opinion from *Drake on Attachments*. We respectfully suggest that a proper application of the rule quoted from Drake will give the plaintiff in error at least the benefit of the Boggs & Buhl judgment, interest, and costs.

I.

THE MAJORITY HAS APPARENTLY CONSIDERED THAT THE PENNSYLVANIA COURT LACKED JURISDICTION IN BOGGS & BUHL v. DUNLEVY, AS WELL AS IN THE "FEIGNED ISSUE" PROCEEDING, ALTHOUGH JURISDICTION IN THE FORMER CASE IS ADMITTED BY DEFENDANT IN ERROR.

There were two separate and distinct proceedings in the courts of Pennsylvania, viz:

- (1) *Boggs & Buhl v. Dunlevy*;
- (2) *The "Feigned Issue" proceeding.*

It is admitted that jurisdiction was acquired in *Boggs & Buhl v. Dunlevy*. Mrs. Dunlevy was served with summons in the State of Pennsylvania.

This court holds that jurisdiction was not acquired in the "feigned issue" proceeding, and we are not now contesting that holding.

Plaintiff in error's main contention before this court was that even should the court hold (as it has held) that the Pennsylvania court acquired no jurisdiction

over Mrs. Dunlevy in the "feigned issue" proceeding, nevertheless plaintiff in error was entitled to protection because of the admitted jurisdiction of the Pennsylvania court in *Boggs & Buhl v. Dunlevy*. (See plaintiff in error's opening brief, pp. 36-43). The answer which the prevailing opinion makes to this vital contention is as follows:

"Applicable to the contention of the defendant that having paid the money into the Pennsylvania court, it discharged the debt and was no longer concerned with the disposition of the money, is the following from *Drake on Attachments*, Sec. 695: 'It follows, hence, that a garnishee must, for his own protection, inquire, first, whether the court has jurisdiction of the defendant, and, next, whether it has jurisdiction of himself. If the jurisdiction exists as to both, he has no concern as to the eventual protection which the judgment of the court will afford him; it will be complete.' In the proceedings upon the writ of garnishment, the garnishee had ample opportunity before it paid the money into court to discover that the defendant in the writ had not been duly served with process, and that the court had no jurisdiction over her."

The section from *Drake on Attachments* unquestionably relates to the inquiry which a garnishee is required to make respecting *the jurisdiction of the court in the action out of which he has been garnished*. Drake says, with exact accuracy, that a garnishee must inquire and ascertain whether that court in that proceeding has jurisdiction over the judgment debtor and over himself. If so, his protection is declared to be complete.

The majority of the court applies this quotation to the case at bar by saying:

“In the proceedings upon the writ of garnishment, the garnishee had ample opportunity before it paid the money into court to discover that the defendant in the writ had not been duly served with process, and that the court had no jurisdiction over her.”

The New York Life Insurance Company obviously could never have discovered that “the defendant in the writ had not been served with process, and that the court had no jurisdiction over her.” Mrs. Dunlevy admits that she was served with process—that she was served with the summons in *Boggs & Buhl v. Dunlevy* while she was in the State of Pennsylvania; admits that the Pennsylvania court had plenary jurisdiction over her in that action.

If the majority of the court meant to say that the New York Life Insurance Company might have discovered that the Pennsylvania court was without jurisdiction in the “feigned issue” proceeding, the quotation from Drake is clearly inapplicable. In the chapter from Drake which contains the quotation in question, the author is considering the jurisdiction of the court in the proceeding in which the writ issued, not any subsequent “feigned issue” proceeding. If the prevailing opinion means that the New York Life Insurance Company might have ascertained that the Pennsylvania court was without jurisdiction in *Boggs & Buhl v. Dunlevy*, then the admitted fact of such jurisdiction has been lost sight of.

II.

IF THE MAJORITY OF THE COURT DID RECOGNIZE THAT THE PENNSYLVANIA COURT HAD UNDOUBTED JURISDICTION OF MRS. DUNLEVY IN *BOGGS & BUHL v. DUNLEVY*, IT HAS NOT SAID HOW OR WHY THAT FACT FELL SHORT OF ENTITLING THE NEW YORK LIFE INSURANCE COMPANY TO PROTECT ITSELF BY PAYMENT INTO COURT.

Aside from that portion of the opinion above quoted, the majority of the court assigns no reason why the New York Life Insurance Company was not entitled to pay the proceeds of the policy into the Pennsylvania court. No authority has been referred which questions that a garnishee may have complete protection by paying what he owes the judgment debtor into court that is, where the court issuing the garnishment has jurisdiction of the judgment debtor and of the garnishee.

20 Cyc. 1093.

“The statutes usually provide that a garnishee may relieve himself from liability both to plaintiff and the principal defendant by paying the money, or delivering the property into court after he has been served with the writ of garnishment. Some of the statutes provide that the court may order the money or property to be deposited in court, where the disclosure shows that the garnishee is possessed of property of or is indebted to the principal defendant.”

No mention is made in the prevailing opinion of the decisions of the courts of Pennsylvania so constru-

ing the garnishment statutes of that state, cited in plaintiff in error's opening brief at pages 37-39.

Singerly's Exrs. v. Woodward, 8 Weekly Notes of Cases 339;

Wilson v. Mayhew, 6 Phila. Rep. 273;

Stockham v. Pancoast, 1 Penn. Dist. Rep. 135;

Fuller v. Bleim, 9 Weekly Notes of Cases 574;

Brooks v. Salin, 14 Weekly Notes of Cases 390;

Cunningham v. O'Keefe, 19 Weekly Notes of Cases 575.

The majority of the court recognized the soundness of the rule by adopting the language of *Drake on Attachments*. The author lays it down as a fundamental principle that, if in the action out of which the garnishment has issued the court has jurisdiction over the defendant, the garnishee's protection will be complete.

Applying this rule to the present case, in *Boggs & Buhl v. Dunlevy*, the Pennsylvania court admittedly had jurisdiction over Boggs & Buhl, the plaintiffs, and over Mrs. Dunlevy, the defendant. It also had jurisdiction over the garnishee, the New York Life Insurance Company. The result which the court must reach, then, is, as Drake says, that the New York Life Insurance Company had no concern as to the eventual protection which the judgment of the court would afford it. Its protection should be complete.

We contend, moreover, that the existence of jurisdiction over Mrs. Dunlevy in *Boggs & Buhl v. Dunlevy*, entitled the New York Life Insurance Company to complete protection as to its entire obligation. The

indebtedness of the Insurance Company to Mrs. Dunlevy was, for the purpose of attachment, personal property of Mrs. Dunlevy within the State of Pennsylvania.

Weiner v. American Ins. Co. of Boston, 73 Atl. 443 (Pa. 1909).

Boggs & Buhl v. Dunlevy was an action at common law in which the Pennsylvania court obtained jurisdiction over Mrs. Dunlevy by valid service of summons within Pennsylvania. The jurisdiction so obtained empowered the Pennsylvania court to enter a money judgment against Mrs. Dunlevy and to enforce such judgment against any property belonging to her within the State of Pennsylvania. The process of the state reached out in aid of this judgment and seized the indebtedness of the insurance company to Mrs. Dunlevy.

We contend that under the decisions of the courts of the State of Pennsylvania construing the statute relating to execution and garnishment, which we cited in our opening brief, the laws of Pennsylvania entitled plaintiff in error to pay the entire amount of the indebtedness into court. If, after such payment, the prothonotary of that court misapplied the moneys, then the party injured might have recourse against him on his official bond.

Shriver v. Harbaugh, 2 Pitts. Rep. (Crumrine) 109.

To hold that a garnishee must determine the exact amount which he shall pay into court when subjected

to a valid garnishment imposes an unnecessary hardship upon him. He is told by the writ to pay over so much as will satisfy the amount mentioned in the writ, together with interest and costs. But greater evil lies in the fact that such a rule authorizes a splitting of the cause of action of the judgment debtor against the garnishee. If such a rule exists, then in every state where Mrs. Dunlevy had a creditor, the New York Life Insurance Company might have been made a garnishee upon this one policy. The better reason and authority are in favor of permitting the garnishee to pay the entire indebtedness into court, leaving it to the court to make a proper disposition of any possible surplus.

Kern v. Chicago Co-operative Brewing Ass'n.,
29 N. E. 1035.

“A judgment rendered against a garnishee must be for the whole amount of the debt to defendant, not merely for enough to pay the plaintiff.”

This petition for rehearing is interposed because in our opinion the author of the leading opinion has either overlooked the fact that the Pennsylvania court had undoubted jurisdiction of Mrs. Dunlevy in the Boggs & Buhl suit or misapplied the rule quoted from *Drake on Attachment*.

We think the facts of the present case furnish an excellent illustration of the fallacy of the argument of the leading opinion. In November, 1909, an execution attachment, unquestionably valid in every particular, was served on the insurance company in Pennsylvania. In February, 1910, the present action was instituted in Marin County, California.

